15 U.S. 551

RECORD, CASE NO. 15353.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893

TERM NO., 969.

ALEXANDER ALLEN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED JULY 22, 1893.

LAW ASSOCIATION OF PHILADELPHIA

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a In the circuit court of the United States for the western district of Arkansas.

Pleas and proceedings before the Honorable Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas holding circuit court—in the case of United States vs. Alexander Allen, indicted for murder.

1 *Indictment.*

UNITED STATES OF AMERICA,
Western district of Arkansas.

In the circuit court, November term, A. D. 1892.

UNITED STATES
vs.
ALEXANDER ALLEN. } Murder.

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present:

That Alexander Allen, on the 14th day of May, A. D. 1892, at the Cherokee Nation, in the Indian country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of one Phillip Henson, a white man and not an Indian, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Alexander Allen with a certain gun then and there charged with gunpowder and one leaden bullet, which said gun he the said Alexander Allen in his hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off, to, against and upon the said Phillip Henson, and that the said Alexander Allen with the leaden bullet aforesaid, out of the gun aforesaid, then and there, by force of the gunpowder aforesaid, by the said Alexander Allen discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, pen-
2 etrate, and wound him the said Phillip Henson in and upon the left side of the breast of him the said Phillip Henson, giving to him the said Phillip Henson then and there with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the gun aforesaid by the said Alexander Allen in and upon the left side of the breast of him the said Phillip Henson one mortal wound of the depth of four inches and of the breadth of half an inch; of which said mortal wound, he the said Phillip Henson then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Alexander Allen him the said Phillip Henson in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

W. H. H. CLAYTON,
United States Attorney, Western District of Arkansas.

(On back) No. 58. United States vs. Alexander Allen. Murder. A true bill. Clyde C. Patton—foreman.

Witnesses:

George Erne 4 mi. S. Coffeyville, Kan.
Magdaline Erne " " " " "
Willie Erne " " " " "
N. [illegible] Clifford, Coffeyville, Kan.
[illegible]. Henson, Sedan, Kan.
A. [illegible]. Knots, Coffeyville, Kan.
A. G. Thompson, 4 mi. S. Coffeyville, Kan.
J. A. Aldridge, 15 " " " "
J. W. Hayden, Lenepah, I. T.

Filed in open court Nov. 11, 1892.

STEPHEN WHEELER, *Clerk.*
By I. M. DODGE, *D. C.*

3 *Record entries.*

In the circuit court of the United States for the western district of Arkansas, November term, A. D. 1892, Friday morning, 8½ o'clock, November 11, 1892.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES
vs.
ALEXANDER ALLEN. } Indictment for murder, No. 58.

On this day come the United States of America by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and makes known to the court that he is destitute and wholly unable to employ counsel, and the court, being well and sufficiently advised in the premises, appointed Messrs. Frederick & Rutherford to defend the said Allen in this cause. And the said defendant having had hearing of said indictment and it being demanded of him concerning said indictment above specified and charged upon him how he would acquit himself thereof, he says he is not guilty as charged in said indictment and puts himself upon the country.

Whereupon by agreement of parties, it is ordered by the court that this cause be and the same is hereby continued to the next term of this court and set down for trial Feb. 10, 1893.

TUESDAY, *Jan. 31st*, 1893.

(Caption omitted.)

On this day come the defendant, by his attorney, and files his application in writing verified upon oath praying for witnesses in his behalf at the expense of the United States.

4 WEDNESDAY, *Feb.* 1st, 1893.

(Caption omitted.)

On this day come on to be heard the application for witnesses filed by the defendant, January 31st, 1893, and the court being fully advised in the premises, doth allow the same.

It is therefore ordered that the legal expense of procuring the testimony of Albert Marks, James Marks, Harvey Marks, and Old Man Marsk, in behalf of said defendant, be paid by the United States, and that a subpœna be issued for them returnable February 10, 1893.

FEBRUARY TERM, 1893, *Friday, Feb.* 10, 1893.

(Caption omitted.)

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas; and come the said defendant in custody of the marshal and by his attorneys, Messrs. Frederick & Rutherford; and it appearing *fr* from the returns of the marshal that the said defendant has been served with a duly certified copy of the indictment in this cause and a full and complete list of the witnesses in this cause; and that he has also been served with a full and complete list of the panel of petit jurors and alternates, as selected and drawn by the jury commissioners for the present term of this court more than two entire days heretofore; and having heretofore had hearing of said indictment and pleaded not guilty thereto, it is, on motion of plaintiff by its attorney, ordered by the court that a jury come to try the issue joined. Whereupon the clerk called the entire panel of the petit
5 jury, and now, after challenge by counsel for both plaintiff and defendant, in the presence of the defendant, the following were selected for the trial of this cause, to wit: Henry C. Allen, Thos. C. Bethel, Thos. A. Conden, Daniel Chapman, Wm. Crager, Elisha Dobbs, Wm. G. Dodson, Lawrence Davenport, August Fisher, Jesse J. George, Jacob R. Raper, Hubbard Stone, twelve good and lawful men of the district aforesaid, duly selected, empaneled, and sworn to try the issue joined and a true verdict render according to the law and the evidence; and after hearing a portion of the evidence, and there not being time to further progress in the trial of this cause, they were put in charge of a sworn bailiff of this court.

And it is further ordered by the court that said jury be kept together and that the marshal of this district furnish meals and lodgings to said jury, and bailiff in charge, until discharged by order of said court.

SATURDAY, *Feb.* 11, 1893.

(Caption omitted.)

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal, and by his attorneys, Messrs. Frederick & Rutherford; and now come the jury heretofore empaneled for the trial of this cause in charge of a sworn bailiff of this court, to wit, Henry C. Allen, Thos. C. Bethel, Thos. A. Conden, Daniel Chapman, Wm. Crager, Elisha Dobbs, Wm. G. Dodson, Lawrence Davenport, August Fisher,

Jesse J. George, Jacob R. Raper, Hubbard Stone, who took their seats in the jury box, and after hearing further evidence, and there not being time to further progress in the trial of this cause, they were put in charge of the sworn bailiff aforesaid.

6 MONDAY, *Feb.* 13, 1893.

(Caption omitted.)

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal, and by his attorneys, Messrs. Frederick & Rutherford; and now come the jury heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit: Henry C. Allen, Thos. C. Bethel, Thos. A. Conden, Jesse J. George, Daniel Chapman, William Crager, Elisha Dobbs, Jacob R. Raper, Wm. G. Dodson, Lawrence Davenport, August Fisher, Hubbard Stone, who took their seats in the jury box, and after hearing the balance of the evidence and argument of counsel and receiving the charge of the court, retired in charge of the sworn bailiff aforesaid to consider of their verdict.

TUESDAY, *Feb.* 14, 1893.

(Captain omitted.)

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal, and by his attorneys, Messrs. Frederick & Rutherford; and now come the jury heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit: Henry C. Allen, Thos. C. Bethel, Wm. G. Dodson, Lawrence Davenport, Thos. A. Conden, Daniel Chapman, August Fisher, Jesse J. George, William Crager, Elisha Dobbs, Jacob R. Raper, Hubbard Stone, who returned into court the following verdict, to wit:

7 We, the jury, find the defendant guilty of murder as charged in the indictment, but recommend him to the clemency of the court, owing to his age.

(Signed) H. STONE, *Forman.*

The jury also signed and attached the following petition to the indictment:

"To the President of the United States and to all it may concern:

"We, the members of the petit jury, who gave hearing to the case of Alexander Allen, accused of murder, owing to his age, recommend him to executive clemency."

Whereupon the jury was by order of the court discharged from the further consideration of the case and the said defendant was remanded to the custody of the marshal to await final sentence.

WEDNESDAY, *March* 29, 1893.

(Caption omitted.)

On this day come the said defendant, by his attorney, and files his motion to set aside the verdict of the jury, and for a new trial in this cause.

SATURDAY, *April* 29, 1893.

(Caption omitted.)

On this day come on for final hearing, the motion, heretofore filed by the defendant, to set aside the verdict of the jury, and for a new trial in this cause; and the court being well and sufficiently advised in the premises doth overrule the same. To which said ruling of the court the defendant at the time excepted.

8 On motion of Jas. F. Read, esq., attorney for the western district of Arkansas, the said defendant, Alexander Allen, was brought to the bar of this court in custody of the marshal of said district, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty heretofore returned against him by the jury in this cause, on the 14th day of February, 1893, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon the premises being seen and by the court well and sufficiently understood, it is considered by the court that the said marshal of the district aforesaid, cause the said Alexander Allen to be taken hence, and him, the said Alexander Allen safely and securely keep, from the date hereof, until Wednesday, July 12th, 1893, and on that day and between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of said day, the said marshal cause the said Alexander Allen to be taken to some convenient place within this district, to be appointed by said marshal, and then and there, between the said hours of nine o'clock in the forenoon and five o'clock in the afternoon, on Wednesday, the said day of July, in the year of our Lord one thousand eight hundred and ninety-three, cause the said Alexander Allen to be hanged by the neck until he is dead.

And it is further considered by the court that the United States of America do have and recover all their costs in and about this
9 prosecution laid out and expended, and that they have execution therefor.

And the clerk of this court is hereby required to furnish the marshal of this district with a duly certified copy of this judgment, sentence, and order, which shall be returned by said marshal, with a full and true account of the execution of the same.

MAY TERM, 1893, *Saturday, June 3rd*, 1893.

(Caption omitted.)

Ordered by the court that defendant have further extension of time, to June 10th, 1893, in which to file his bill of exceptions herein.

SATURDAY, *June* 10, 1893.

(Caption omitted.)

On this day, on motion of defendant, it is ordered by the court that defendant have further extension of time, to June 20th, 1893, to perfect his appeal herein.

WEDNESDAY, *June* 14, 1893.

(Caption omitted.)

On this day come the said defendant, by his attorney, C. J. Frederick, esq., and tenders his bill of exceptions, and asks that the same be signed and made a part of the record in this cause, which is accordingly done. And the defendant also files his assignment of errors, and petition for writ of error to the Supreme Court of the United States, together with this petition, supported by affidavit, praying for an appeal in this cause at the expense of the United States.

10 TUESDAY, *June* 27, 1893.

(Caption omitted.)

On this day comes the clerk of this court and makes known that a writ of error, taking this case to the Supreme Court of the United States, has been issued by the said clerk in this case.

It is, therefore, hereby ordered by the court that execution of sentence, heretofore pronounced in this cause, be stayed pending the action of the Supreme Court.

11 *Bill of exceptions—Filed June* 14, 1893.

UNITED STATES CIRCUIT COURT,
Western District of Arkansas.

UNITED STATES
vs.
ALEXANDER ALLEN. } Murder.

Be it remembered that on this 13th day of February, 1893, come on to be tried this case.

Came the United States and the Hon. W. H. H. Clayton, United States district attorney, who prosecutes for the plaintiff, and also came the defendant in custody of the marshal and by his attorneys, Mess. Frederick & Rutherford.

The United States, to maintain the issues on its part, introduced and examined the following named witnesses: George Erne, Willie Erne, Magdaline Erne, N. M. Clifford, James A. Clifford, J. W. Hayden, Abner G. Thompson, A. W. Knotts, William A. Hanson, who testified as follows:

12 GEORGE ERNE, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. W. H. H. Clayton, and testified as follows, to wit:

Question. What is your name?

Answer. George Erne.

Q. How old are you, George?

A. I will be 16 next August—the second day of August.

Q. You were 15 last August?

A. Yes, sir.

Q. Where do you live?

A. I live in Coffeyville, Kansas; I live there now; when this happened I lived four miles south of Coffeyville, Kansas.

Q. You lived four miles south of Coffeyville, Kansas, at the time that Hanson was killed?
A. Yes, sir.
Q. On whose place did you live?
A. On John Morgan's place.
Q. Who did you live with?
A. I lived with my father and mother.
Q. Did you know Phillip Hanson in his lifetime?
A. I knew him 2 years.
Q. You knew him when he was alive?
A. Yes, sir.
Q. You knew him for two years before his death, did you?
A. Yes, sir.
Q. How old a boy was he?
A. I believe he was about 18, or somewheres along there.
Q. He was a white boy, was he?
A. Yes, sir.
Q. Is he alive or dead?
A. He is dead.
Q. He was not an Indian?
A. No, sir.
Q. Do you know this defendant, Alexander Allan?
A. I know him when I see him; but I never knew him before that.
13 Q. When did you first see him; how long before Phillip Hanson's death?
A. Two days before that.
Q. On what day was Phillip Hanson killed?
A. Saturday.
Q. Do you remember the day of the month?
A. No, sir.
Q. Do you know what month it was?
A. No, sir.
Q. It was on Saturday that he was killed?
A. Yes, sir.
Q. And two days before that you saw this defendant?
A. Yes, sir.
Q. Where were you?
A. I was taking a wire stretcher over to Mr. Hanson's and me and my brother—and Phillips, he was plainting watermelons right north of Hanson's house, his father's house, and Willie—that is my brother—he staid there with Phillip Hanson until I took the stretcher on to the house and came back, and when I came back Willie, my brother, and Phillip Hanson was down inside of our field by the straw stack, and Alexander Allen and the biggest Marks boy was there.
Q. Is he a colored boy, too?
A. Yes, sir.
Q. I believe the defendant is a colored boy, is he not?
A. Yes, sir.
Q. What is the name of the biggest one of the Marks boys, do you know?

A. No, sir; I don't know his name.
Q. You found them all there at the straw stack?
A. Yes, sir.
Q. Was it Mr. Hanson's straw stack?
A. No, sir; it was my father's.
Q. How far did you live from Hanson's?
A. A quarter of a mile.
Q. Go on and state what occurred there at the straw stack.
A. When I came down there Alexander Allan asked me, said, "What are you boys all doing over there," and I told him, "What was it
14 to him what we were doing," and he said it was nothing to him, and he asked me if I saw his horses—saw Morgan's horses—and I told him no, and then my brother Willie told him, "Yes, I seen them this morning when I came from Coffeyville; they were north of our pasture." And then he said to the other boy, "Well, let's go."
Q. Who said that?
A. Alexander Allen.
Q. The defendant?
A. Yes, sir; he said to the other boy, "Let's go," and then Phillip said, 'Cross right here where we did."
Q. Cross what?
A. Cross the branch. And he said, "No——"
Q. Who said no?
A. Alexander Allen. He said, "No, we will go up this way," and I said, "Pa don't allow you to go through the hog lot; there is so many hogs in there and the dogs will scare the hogs."
Q. Did they have dogs?
A. Yes, sir.
Q. How many dogs?
A. Three or four. And then he said, "No, come on; we will go up this way and cross," and Willie said, "No, you can cross right here." That was my brother said that. And then he said, "No, you can cross right here just as easy," and he said he knows where to cross; he had been along here more than once.
Q. That is what Alexander Allen, the defendant, said?
A. Yes, sir; and they went on.
Q. That is all that occurred that day, now, between you boys?
A. Yes, sir.
Q. You didn't have any fight?
A. No, sir.
Q. Were there any other cross words except what you have said?
A. No, sir.
Q. Now, that was what day; two days before the killing?
A. Yes, sir.
15 Q. The killing was on Saturday, and this would be Thursday?
A. Yes, sir.
Q. State what occurred after that.
A. On Friday I saw John Morgan below our field, and he said——
Q. I suppose I will not be entitled to what Morgan said. You saw John Morgan, the man whom these men claimed they were hunting horses for?

A. Yes, sir.
Q. Where did you see Morgan?
A. On the south side of our field.
Q. Did you have some talk with him about these horses?
A. Yes, sir.
Q. You needn't state what he said. What occurred after that? That was on Friday you saw Morgan?
A. Yes, sir; and he asked me——
Q. Never mind what Morgan said; that is not evidence; the law does not allow us to have that. You may go on and state what occurred after that. Let Morgan go now.
A. Then Saturday we were starting to go northeast of our house to a lake fishing——
Q. Who started to go?
A. Me, Willie, and Phillip Hanson.
Q. You and your brother and the deceased?
A. Yes, sir.
Q. What did you take with you?
A. Took some little willow sticks, about so long [indicating between 3 and 4 feet long]; each of us had one.
Q. What was that for?
A. To kill frogs to bait the hooks with.
Q. Did you take your fishing lines with you?
A. Yes, sir.
Q. How thick were those sticks?
A. About as thick as my finger.
Q. Were you going to kill frogs to get their legs?
A. We were going to use the frogs for bate to put on the hook.
Q. How far was that lake off?
A. About half a mile from our house.
16 Q. Northeast?
A. Yes, sir.
Q. Did you go the road or how did you go?
A. No, sir; we went through the wheat field.
Q. Do you know where Marks lives—the colored man?
A. Yes, sir.
Q. How far did he live from where you lived?
A. He lived about a quarter of a mile; a little more east than north.
Q. When you started to go fishing on Saturday, what time in the day did you start?
A. We started from home about 11 o'clock—well, a little before 11.
Q. The three of you?
A. Yes, sir.
Q. Did you go the road?
A. No, sir.
Q. How did you go?
A. We went through the wheat field.
Q. Did you go by Marks's house?
A. Yes, sir.
Q. How close to his house?

A. We were about 100 steps away from his house, but we were closer to his barn than we were to the house.
Q. Closer to the stable?
A. Yes, sir.
Q. Were you going directly towards the lake?
A. Yes, sir.
Q. You were in the wheat field, you say?
A. Yes, sir.
Q. Is there any fences there?
A. Yes, sir.
Q. Where was the fence?
A. The fence was right on the west side of Marks's house and on the east side of the wheat field.
Q. You were on the west side of the fence?
A. Yes, sir.
Q. On your own side?
A. Yes, sir.
Q. Going to that lake?
A. Yes, sir.
Q. Go on. You started to go to the lake?
17 A. When we got about half-way there——
Q. Half-way from where?
A. Half-way across the field we saw them two boys.
Q. What two boys?
A. Alexander Allan and the Marks boy.
Q. Which one of the Marks boys?
A. The smallest one.
Q. He is here, is he not?
A. Yes, sir.
Q. Do you know his name?
A. No, sir.
Q. You saw them where?
A. Saw them standing behind the hogpen; when we got nearer to the house then they walked on up the fence on the east side of the fence; walked up in between the chicken house and the corn pen, and hollered to me where we were going, and I told him, "Going fishing."
Q. How far were you from them when they hollered at you and asked you where you were going?
A. About 40 or 50 steps.
Q. Were they at the chicken house then or had they passed it?
A. They were right between the chicken house and the corn pen.
Q. Is that corncrib there at the stable?
A. Yes, sir.
Q. Between the chicken house and then stable, then?
A. Yes, sir.
Q. They holloed at you and asked you where you were going?
A. Yes, sir.
Q. Where did you tell them?
A. Going over to the lake, fishing.
Q. Go ahead.
A. And we kept on going, and both boys followed up over there——

Q. They were on the other side of the fence?

A. Yes, sir; and so, then, Alexander Allan, he hollered at us to stop, and we stopped; and then he pulled his pistol out of his hip pocket, and he had a rubber scabbard on it——

18 Q. On which side of the fence was he?

A. On the east side of it then.

Q. You were on the west side?

A. Yes, sir.

Q. How far were you from the fence when he did that?

A. About 20 steps or more. He handed the scabbard to Marks's smallest boy and told him to hold it, and he got through the fence and he came over where me and my brother Willie and Phillip Hanson were, and he hit Phillip Hanson in the mouth with his fist—with his left hand, and then he started to shoot him with the pistol, and Phillip grabbed the pistol and pushed it down and it shot into the ground; when he shot he turned loose, or dragged it away, or anyhow, he got the pistol away from him——

Q. Who did?

A. Alexander Allan got it away from Philli' Hanson. And then Phillip turned around to go back, and just while he was turning around he shot him in here [pointing to left part of body on chest]. And the ball struck in front here, and he shot him in the back, and the ball stuck in here.

Q. You found where the balls came out afterwards?

A. Yes, sir.

Q. He shot him here in front first and then in the back?

A. Yes, sir.

Q. What was Hanson doing when he shot him in the back?

A. Had his back towards him, starting towards home.

Q. What were you doing?

A. I was going towards home, too. I was standing when Phillip started, and then he shot me in the arm, right here, right below the bone; it went through the muscle.

Q. How far were you from him when he shot you through the arm?

A. About 3 or 4 steps away from him. When I was going away he fired and the ball just passed my head this way, and then he

19 snapped the pistol at Willie, my little brother."

Q. Did he say anything to Willie?

A. He told him to get away from there. And then Alexander went back to the fence and got through and went to the house——

Q. Did you see him?

A. Yes, sir; and got two satchels out of the house; went in the north door and came out of the south door; and then went out to the cart and got in.

Q. What kind of a cart?

A. One of those two-wheeled carts; one that has a box on it.

Q. Was it a cart used there on the farm for dumping, or just a kind of a road vehicle?

A. It is one of those you would use on the farm. He got in that and made his horse go as fast as he could towards Coffeyville.

Q. Left there?

A. Yes, sir.

Q. Then what did you do?

A. Then Phillip Hanson he fell down; he was about 3 steps ahead of me, and he said, "George, I am going to die; I am shot twice," and then he fell down, and said for me to help him—and then he fell down—that is the way it is—and then I knelt down and leaned his head on my knee, and he told me to tell his folks good-bye; and when he fell down I told Willie to go home and tell them that Alexander Allan shot Phillip, and so they came.

Q. Did you stay there with Phillip?

A. Yes, sir.

Q. How long did Phillip live?

A. He didn't life hardly any time.

Q. Was he dead before the people got there?

A. Yes, sir.

Q. How long did he live after he told you to tell his folks good-bye?

A. He just got it out of his mouth; just said it and then died.

Q. Then you sent Willie for Mr. Hanson and your father?

A. Yes, sir.

Q. Did they come back there?

A. Yes, sir.

Q. Where did Phillip fall; how far from the fence? After he was shot, how far did he go from the place he was shot?

A. Only about 6 steps.

Q. Then he fell and died there?

A. Yes, sir.

Q. Do you know whether there was any blood left there on the ground where he fell?

A. No, sir; I have not been there since; I know there was blood on the ground, but——

Q. Now, then, that is all that Phillip said to you, is it?

A. Yes, sir.

Q. When the defendant got through the fence, you say he took his pistol out before he got through the fence?

A. Yes, sir.

Q. When he came down to where you boys were, after getting through the fence, how far did he walk to get to you?

A. He walked about 15 or 20 steps.

Q. How far did he walk after he got through the fence to get to you; that is what I am trying to get at; or, in other words, how far were you from the fence when he got to you?

A. We were about 20 steps away from the fence.

Q. Did you boys strike him with your clubs or sticks?

A. No, sir.

Q. He struck Phillip, you say, in the mouth with his left hand?

A. Yes, sir.

Q. Is that the first lick that was made?

A. Yes, sir.

Q. Where was his pistol when he struck Phillip?

A. He had it held in his right hand, hanging down right by the side of him.

21 Q. Did you ever see the pistol?

A. I seen it when he had it.

Q. You only saw it in his hands?

A. Yes, sir.

Q. Could you tell what kind of a pistol it was?

A. No, sir; I could not say anything about the——

Q. He held his pistol down this way while he struck him with his left hand in the mouth; is that right?

A. Yes, sir.

Q. You say that occurred now in the wheat field, on the opposite side of the fence from where Marks lived?

A. Yes, sir.

Q. And from where the cornerib and hogpen were?

A. Yes, sir.

Q. How long after the shooting was it before the folks came up from the house?

A. It was about 15 minutes.

Q. How far was it down to the house?

A. It was about a quarter of a mile from where Phillip Hanson lay to our house, and then it was about a quarter of a mile from there to Hanson's house, made about a half a mile from where Phillip law to Hanson's house.

Q. Tell me what the first word that was said by any of you when you went up across the wheat field to the place where the shooting occurred. What was the first word that was said between you and this colored boy? Who spoke first, and state what was said?

A. Alexander Allan spoke first, and asked us where we were going.

Q. And you said you were going fishing?

A. A. He said, "George, where are you going," and I said, "Going fishing over here to the lakes."

Q. Then what did he say?

A. He never said anything then until he walked up over there and told us to stop and not to go another step further.

Q. Did he say that before he drew his pistol out or afterwards.

A. Afterwards.

22 Q. And told you not to go another step further?

A. Yes, sir.

Q. You say that he had a scabbard and he handed that to the little boy that was with him?

A. Yes sir.

Q. How big was that boy; was he as large as this defendant?

A. No, sir.

Q. What did the Marks boy do while this shooting was going on?

A. He didn't get through the fence; he just stood through the fence and held the scabbard until he got through the shooting.

Q. When the defendant left there in the cart, as you call it, and run the horses off, what became of the Marks boy?

A. He went, too.

Q. He went with him, did he?

A. Yes, sir.

Q. They both went together?

A. Yes, sir.

The COURT. Whose cart was that?

The WITNESS. Marks's.

The DISTRICT ATTORNEY. You don't know where this defendant lived at that time?

A. He staid at Marks's when I first heard tell of him.

Q. Was there a horse standing hitched to the cart?

A. Yes, sir.

Q. Did you see any grown persons around there at the house?

A. No, sir.

Q. Or anywhere else?

A. No, sir.

Q. There was nobody but you boys present, five of you—you, and Phillip, and Willie, and the defendant, and the little Marks boy?

A. Yes, sir.

Q. When was this you were going fishing, about how long ago?

A. Oh, it was last year, I don't know how long ago.

Q. How high was the wheat; you say you went through the
23 wheat field?

A. The wheat was about knee high.

Q. I believe you have stated that Phillip Hanson, the deceased, was a white boy; his father is a white man?

A. Yes, sir.

Q. His father is here, is he not?

A. Yes, sir.

The COURT. You stated it was at watermelon planting time?

The WITNESS. Yes, sir.

The DISTRICT ATTORNEY. I can show the exact date by some older persons we have here as witnesses. (To the witness.) You have stated that Phillip was shot here in the left armpit, under the left arm?

A. Yes, sir.

Q. Did you examine his wounds to see where he was shot?

A. I seen the wound under his arm here; I seen it looked like two balls were stuck there; I never examined on his back any.

Q. How do you know that he was shot in the back?

A. It looked like two balls, and I know he fired at him when he was going off from him.

Q. It looked like two balls in here?

A. Yes, sir.

Q. You don't know anything about his clothing, I guess, do you?

A. No, sir.

Q. How big a boy was Phillip?

A. He was about as heavy as I am, but he was a little taller.

Q. How far was this from Coffeyville?

A. It was about 4 miles south.

Q. Directly south, was it?

A. Yes, sir.

Q. In the Cherokee Nation?

A. Yes, sir.

The COURT. Do you know where the line is there?

A. Yes, sir.

The DISTRICT ATTORNEY. Coffeyville is not exactly on the line, is it?

A. No, sir.

24 Q. About 2 miles from it?

A. Yes, sir.

Q. How long had you folks lived there?

A. We lived there about seven years.

Q. You are living now at Coffeyville?

A. Yes, sir; my brother Willie lives down there yet, but we moved up to Coffeyville to go to school.

Q. How long had Mr. Hanson lived there?

A. He lived on the other side of the river one year, and on this side one.

Q. What river?

A. The Verdigris River.

Q. Then the defendant fired four shots in all—two into Hanson, one into you, and one that he missed you; is that right?

A. No, sir; he shot five shots.

Q. Oh, yes; the one that he fired into the ground, and then two into Hanson is three, and one into your arm is four, and one passed your head is five?

A. Yes, sir.

The COURT. You say that he snapped the pistol once?

The WITNESS. Yes, sir.

The COURT. Does that shot it has been snapped (speaking to the district attorney, and referring to pistol in the hands of the district attorney)?

The DISTRICT ATTORNEY. I don't believe there is any load in it—yes, there is a load in it.

The COURT (to witness). Who did he snap the pistol at; did I understand you to say?

A. My little brother.

The DISTRICT ATTORNEY. This pistol is a six-shooter. (To the witness.) Five shots were fired?

A. Yes, sir.

Cross-examination by Mr. C. J. FREDERICK:

You say you are 15 years old?

A. Yes, sir.

25 Q. You will be 16 when?

A. The second day of August.

Q. You say Philip Hanson was about 18 years old?

A. Yes, sir.

Q. Are there a many negroes living around in that neighborhood?

A. Yes, sir; a good many down along the river.

Q. Where did you all come from before you moved there?

A. Barton County, Missouri.

Q. Where did Hanson come from?

A. From Chataquah County, Kansas.

Q. You say you didn't have any fuss with the Marks boy and the Allan boy the day you were hunting horses?

A. No, sir.

Q. All peaceable and quiet, and no hard words at all?
A. Yes, sir.
Q. You say it was the larger Marks boy that was along with him that day?
A. The larger Marks boy was along when we saw him down at the siraw.
Q. That is the time I am talking about?
A. Yes, sir.
Q. That was two days before the killing?
A. Yes, sir.
Q. That was on Thursday, then?
A. Yes, sir.
Q. You and Phillip Hanson—your name is George?
A. Yes, sir.
Q. And Willie, your brother—you three were together that day?
A. Yes, sir.
Q. And Alexander Allan and this Marks boy were out hunting horses?
A. Yes, sir; that is what they claimed.
Q. And they asked you if you had seen anything of the horses?
A. Yes, sir.
Q. You told them you hadn't?
A. Yes, sir.
Q. Then didn't he ask you where the crossing of the creek was—was it a creek or river?
A. Creek.
Q. How big a creek is it?
A. Oh, a small creek.
26 Q. Who told him where to cross?
A. Phillip Hanson told him, and I told him, too. We both told him where to cross.
Q. The place where you told him to cross was not a fordable place, was it?
A. Yes, sir.
Q. Was it not a boggy, mirey place?
A. No, sir.
Q. Did he cross there?
A. No, sir.
Q. Did he not say it was boggy and he could not cross there?
A. No, sir.
Q. He didn't complain that *he* was a boggy place and he could not cross there, or that it was mirey?
A. No, sir.
Q. Didn't you and Phillip throw sticks and rocks at him and the Marks boys?
A. No, sir.
Q. Didn't you follow them?
A. No, sir.
Q. Didn't you follow them three, four, or five hundred yards?
A. No, sir.
Q. And throw sticks at them?

A. No, sir.
Q. And curse them?
A. No, sir.
Q. Didn't you or Phillip, one, call him a black nigger son-of-a-bitch?
A. No, sir.
Q. Did you say Phillip pulled off his hat and threw it down on the ground—did you see him do that?
A. No, sir; Phillip never took his hat off and threw it on the ground.
Q. Didn't you see him pull off his hat and throw it down on the ground and curse this boy Alexander Allan—say that he intended to kill that damned nigger the first chance that he got?
A. No, sir.
Q. Nothing of that sort?
A. No, sir.
Q. Had you ever seen him before that time?
A. No, sir.
Q. Had you ever seen the Marks boy before?
A. Yes, sir.
27 Q. You knew the Marks boy, did you?
A. Yes, sir; I know him when I saw him; I never had much to do with him.
The DISTRICT ATTORNEY. That is the biggest Marks boy; he was not at the killing.
Mr. FREDERICK (to witness). You don't know what his name is?
A. No, sir.
Q. You tell this jury here there was no fuss or quarrel, or no hard words there at all; you swear here that there was no hard words or fuss, or cursing words used there that day at the straw stack on Thursday?
A. Yes, sir.
Q. Eighter by yourself or your brother, or Phillip?
A. No, sir.
Q. You tell this jury you didn't throw any sticks at them, or rocks, or curse them?
A. Yes, sir.
Q. None of this language I have asked you about was used at all, or nothing like it?
A. No, sir.
Q. And didn't you do that because they were niggers?
A. No, sir.
Q. You had started fishing on Saturday?
A. Yes, sir.
Q. You same three boys?
A. Yes, sir.
Q. Why did you go by Marks's?
A. We had to go by there to get to the lake.
Q. Did you see the old man Marks there that day?
A. No, sir.
Q. You knew him, didn't you?
A. Yes, sir.
Q. You knew that this boy staid down there, didn't you?
A. I never knew nothing but what Morgan said.

Q. You understood that this boy staid down there?
A. Yes, sir.
Q. Did you have to go through Marks's yard to get to the lake?
A. No, sir.
Q. Did you have to go by the stable or the hen house?
28 A. No, sir.
Q. Where did you have to cross the fence to get to the lake?
A. Had to cross north of Marks's place, house and stable; had to cross our fence north of Marks's house and stable to get to the lake.
Q. How far north?
A. Just according to whether we wanted to go right straight to the lake; it would have been about 50 steps or more.
Q. Is that where you did cross?
A. We didn't go across.
Q. Is that where you started to go across?
A. Yes, sir.
Q. You didn't get across the fence at all?
A. No, sir.
Q. None of you?
A. No, sir.
Q. Didn't you cross the fence and get in the yard, all three of you?
A. No, sir.
Q. You didn't go in the yard at all?
A. No, sir.
Q. You saw this boy and the little Marks boy going on down home, did you, in the buggy or cart?
A. No, sir.
Q. Didn't you see them going down there at all?
A. No, sir.
Q. Didn't you see them when you got up close to the house?
A. We saw them setting behind the hog lot when we got about halfway through the field, or, rather, standing; they were not setting.
Q. What were they doing, standing or setting, which?
A. They were standing.
Q. What were they doing?
A. Doing nothing but standing; that is all I could see.
Q. How far were you from them when you first saw them?
Q. I could not say how far it was.
29 Q. You say the field is about a quarter of a mile across it?
A. Yes, sir.
Q. You got about halfway across the field?
A. Yes, sir.
Q. That would be some 2 or 300 yards, I suppose?
A. Yes, sir.
Q. You went straight on towards where they were, did you; did you go on straight towards where you saw them standing behind the hog lot?
A. No, sir.
Q. Which way did you go?
A. We went towards the lake.
Q. Did you go from them?
A. We went from them; yes, sir, more than we went to them.

Q. You didn't get much closer to them, dod you?
A. No, sir.
Q. You didn't get any closer then than two or three hundred yards?
A. Yes, sir.
Q. How did you get closer to them unless you had gone that way towards them?
A. Yes, sir; we went that way.
Q. Then you did go towards them, didn't you?
A. Yes, sir; we got closer to them the further we would go; but we didn't go to where they were.
Q. But the further you went the closer you got to them?
Yes, sir.
Q. You could see them all the time while you were going on, could you?
A. Yes, sir.
Q. Did you see them handling a milk can or churn?
A. No, sir.
Q. You saw nothing of that kind?
A. No, sir.
Q. You saw no milk can threr or churn?
A. No, sir.
Q. You saw nothing of the sort?
A. No, sir.
Q. You told me you hadn't seen the old man Marks there at all?
A. No, sir.
30 Q. How did you happen to start about 11 o'clock in the day to go fishing; why didn't you wait until after dinner?
A. I don't know; there was nobody home then but me; pa and the kids, all of them, were up to town, and ma was going to wait until pa would get home.
Q. How come you to go with Phillip Hanson that morning; how did you get with him?
A. Me and my brother Willie went down on the river to buy some goslins, and he was down on the river, and he come on. He went with us up to our house.
Q. How come him to go up to your house?
A. Because we wanted him to.
Q. What did you want him to go for?
A. Just to have some fun.
Q. What sort of fun?
A. Oh, run around and jump around.
Q. Run around hunting niggers?
A. No, sir; that wasn't our business.
Q. You wanted to have some fun running around and jumping around?
A. Yes, sir.
Q. You went up to the house, did you, with Phillip?
A. Yes, sir.
Q. How long did you stay around the house before you went off fishing?
A. About half an hour.
Q. Can you see Marks's house from your house?
A. Yes, sir.
Q. Is that a prairie country?

A. Yes, sir.
Q. You can see Marks's house from your house very plainly, couldn't you?
A. Yes, sir.
Q. Could you see a person riding along towards there, driving along, from your house to Marks's?
A. Yes, sir; from our house if you could get there, but you can't get there.
31 Q. I sa', if there was anybody driving along by your house to Marks' house, you could see them?
A. Yes, sir.
Q. You could see them drive a buggy or a cart, couldn't you?
A. Yes, sir.
Q. Who lived at Marks's place?
A. Marks lived there.
Q. The old man?
A. Yes, sir.
Q. Who else?
A. His boys.
Q. No woman staid there?
A. No, sir; I never seen any woman.
Q. You are not acquainted much with the Marks boys, you say?
A. No, sir; I knew them when I saw them, but I am not acquainted with them much.
Q. Did you ever have any fuss with them?
A. No, sir.
Q. Or quarrel?
A. No, sir.
Q. You say you had started off down to the lake fishing?
A. Yes, sir.
Q. You took willow sticks along with you?
A. Yes, sir.
Q. Couldn't you get willow sticks down at the lake?
A. No, sir.
Q. No sticks anywhere down that way?
A. No, sir; not where we were going to go to.
Q. Did you get fresh, green sticks?
A. Mine and Phillip's was dry, and Will's was a little green one, a limber one.
Q. How long had you had these sticks?
A. Oh; we had them about an hour.
Q. Where did you get them?
A. We got them in our field. We got them right close to the hog lot.
Q. You cut them with a knife, did you?
A. No, sir; we cut the one that Will had with a knife.
Q. You cut the others with an ax?
32 A. No, sir; the others we already had.
Q. Did you cut off the right lengths?
A. No, sir; we cut them in two.
Q. What with?
A. With a knife.

Q. They were willow, were they?
A. Yes, sir.
Q. How big did you say the sticks were?
A. About as big as my thumb.
Q. The ones that you and Phillip had?
A. Yes, sir.
Q. How big was the one your brother had?
A. Just a little limber one, about as big as my little finger.
Q. How long?
A. Them me and Phillip had was about as long as a walking cane.
Q. You sort of used them as a walking cane in walking, didn't you?
A. Yes, sir.
Q. How close did you get to these boys before this boy called to you to know where you were going?
A. We got up about 40 steps.
Q. About 40 steps from where he was?
A. Yes, sir.
Q. And he holloed to know where you were going?
A. Yes, sir.
Q. You said, "I am going to go fishing?
A. Yes, sir.
Q. Did you keep going?
A. Yes, sir.
Q. Just walked on?
A. Yes, sir.
Q. Going on towards him, were you?
A. No, sir; we were angling cross.
Q. He was here inside of the fence?
A. He was on the east side of the fence.
Q. Next to the house?
A. Yes, sir.
Q. What sort of a fence was it?
A. It was a wire fence.
Q. Six wires or strands?
A. Yes, sir.
33 Q. Could a person get between the wires?
A. Yes, sir; he could get between the top wire and the second wire, but he could not get between the others.
Q. Get through it right easily? It was a barb-wire fence?
A. Yes, sir.
Q. Didn't you boys go through the fence at all?
A. No, sir.
Q. That is all you said, I reckon, when he said "Where are you boys going?" You said you were going to the lake fishing? And that is all you said?
A. Yes, sir.
Q. On Thursday before you did say when he asked you what it was to him, but you didn't say that to him on Saturday?
A. No, sir.
Q. You said, "We are going to the lake fishing?"
A. Yes, sir.

Q. Did you ask him to come and go with you?
A. No, sir.
Q. What did he say then to you?
A. He never said nothing to us; just kept walking along the fence?
Q. Were you walking along the fence, too?
A. No, sir; we were not to the fence.
Q. Were you walking away from the fence?
A. We were walking towards the fence, but wasn't at the fence.
Q. Did he say anything more to you?
A. He told us to stop.
Q. You had got pretty close to him?
A. He wasn't much closer to us then than when he hollered at us where we were going.
Q. He was about 40 steps from you when he holle'ed to you to know where you were going?
A. Yes, sir.
Q. He didn't get much closer than that?
A. No, sir.
Q. What did he do next?
A. Then he told us to stop and then he walked up to us.
34 Q. He told you to stop, he was 40 steps away from you, and had his pistol in his hand?
A. Yes, sir.
Q. Had you seen him with the pistol when he asked you to stop at first?
A. Yes, sir.
Q. You didn't go towards him when you saw him with the pistol, did you?
A. No, sir; we went towards us.
Q. You stopped still?
A. Yes, sir.
Q. Let him come towards you with the pistol?
A. Yes, sir.
Q. Did you say anything to him?
A. No, sir.
Q. None of you said a word?
A. No, sir.
Q. All stood there dumb?
A. Yes, sir.
Q. Phillip didn't say anything to him?
A. No, sir.
Q. Just stood still until he got through the fence?
A. Yes, sir.
Q. It took some trouble to get through, did it not?
A. No, sir; it seemed to me like he got through pretty easy.
Q. You were standing watching him?
A. Yes, sir.
Q. You stood still until he came up to Phillip and hit him with his fist?
A. Yes, sir.
Q. You didn't do anything?
A. When he was shot the first time I didn't know what to do.

Q. But when he first walked up to Phillip, and had the pistol in his hand, you allowed him to get through the f'nce and walk 40 yards? And then hit Phillip in the face with his fist, and Phillip never offered to hit him?

A. He didn't walk 40 yards, but 40 steps.

Q. Phillip just stood still and let him hit him.

A. Yes, sir; he stood there until he hit him. As quick as he hit him he started to shoot him.

Q. How close were you to Phillip?

35 A. I was about 4 or 5 steps away from Phillip.

Q. You didn't offer to interfere at all, did you?

A. No, sir.

Q. The little Marks boy that was along, he didn't come over there at all?

A. No, sir.

Q. Just this one boy came along to you three, and you three just stood there and let him hit you and shoot at you, and you never offered to do anything; is that right?

A. Yes, sir.

Q. He hit Phillip and Phillip never struck back at him?

A. No, sir; Phillip never struck at him.

Q. Didn't try to keep him from striking, did he?

A. No, sir.

Q. You didn't say anything to him?

A. No, sir.

Q. Did Phillip say anything to him?

A. No, sir.

Q. What did he say when he hit Phillip?

A. He never said nothin'.

Q. There you were, all out there, you three boys standing there and let one boy come up and hit him in the face, and not one of you do anything or say anything; is that right?

A. Yes, sir.

Q. Didn't Phillip hit him with his fist?

A. No, sir.

Q. Didn't you hit him with the stick?

A. No, sir.

Q. Didn't Phillip hit him with the stick he had?

A. No, sir.

Q. Didn't Phillip have him down on the ground?

A. No, sir.

Q. Didn't Phillip and you both strike him with the stick while you had him down on the ground?

A. No, sir.

Q. That is not true; it is not that way?

A. No, sir.

Q. Didn't he get his pistol out to shoot Phillip while you and Phillip had him down on the ground?

A. No, sir.

Q. That is not true?

A. No, sir.

Q. After he got up didn't you then hit him on the back of the head with the stick?

A. No, sir.

36 Q. And then didn't he shoot at you?

A. He shot at me, but I didn't hit him.

Q. Did you hit at him?

A. No, sir.

Q. Not at all?

A. No, sir.

Q. No one hit at him?

A. No, sir.

Q. Or offered to strike him?

A. No, sir.

Q. You have not been a witness in this case before, except before the grand jury, have you?

A. Yes, sir; we had a trial up in Independence, Kansas.

Q. Was the testimony written down?

A. Yes, sir.

Q. Who was that trial before?

A. We went up there that day to tell what we knowed; I don't know who got the papers.

Q. But it was written down?

A. Yes, sir.

The DISTRICT ATTORNEY. Did you tell it before an United States officer or just before Mr. Clifford?

A. I told it to Mr. Clifford, but we never swore to it.

Mr. FREDERICK (of counsel for defendant). Then you never swore at all, did you?

A. Yes, sir; we did at Independence.

Q. Was that written down?

A. Yes, sir.

The DISTRICT ATTORNEY. We have never obtained any papers purporting to be an examination before a commissioner. We have written for them once, but didn't get them.

Q. Do you know the commissioner's name in Kansas?

A. No, sir.

Mr. FREDERICK (of counsel for defendant). You say Phillip Hanson was about 18 years old, but he was taller than you and about your weight; is that it?

A. Yes, sir.

Q. When he shot Phillip and then shot you in the arm, he did it right quick, didn't he?

A. Yes, sir; he done it as fast as he could.

37 Q. And snapped at your little brother?

A. Yes, sir.

Q. Didn't you leave, then?

A. Yes, sir.

Q. You run?

A. Yes, sir; I run a ways.

Q. You state you were scared?

A. Yes, sir.

Q. How far off did you run?

A. I didn't run but four or five steps before Phillip fell; when he fell then I went back to him.

Q. How far was Phillip when he fell from the house of Marks's?

A. I don't know how far it was.

Q. Well, guess at it.

A. I could not guess.

Q. Was it 100 yards?

A. I don't know.

Q. You say you saw this boy go back to the house and get out two valises?

A. He got out one and Marks's boy got out one.

Q. They come back out with two valises?

A. Yes, sir.

Q. Got into the cart and drove off?

A. Yes, sir.

Q. Did you know who the boy was then?

A. No, sir.

Q. You didn't know his name then?

A. No, sir.

Q. You had never been with him before?

A. No, sir.

Q. How did he know your name?

A. I expect the Marks boy told him; I don't know.

Q. Called you George?

A. Yes, sir.

Q. Didn't he call Phillip, Phillip?

A. No, sir.

Q. You stated that he said, "George, where you going?" Didn't you say that?

A. Alexander Allan said, "George, where are you going?"

Q. He said "George?"

A. Yes, sir.

Q. Didn't he say "Phillip," where are you going?

A. No, sir.

Q. Is it not a fact you were acquainted with this boy before?

38 A. No, sir.

Q. You don't know whether Phillip knew him or not?

A. No, sir.

Q. You never heard Phillip say anything about it?

A. No, sir.

Q. Didn't you expect to find him down there about the house when you went down there that day?

A. We didn't know whether he was there or not; we didn't go to hunt him.

Q. Didn't you aim to see him?

A. We didn't think about him.

Q. Hadn't you been talking about him after you left home—about seeing those boys down there?

A. No, sir.

Q. Hadn't you boys been talking about him as you went on down through the wheat field there that day?

A. No, sir.

Q. When you went down on the river and you told Phillip to come up with you, didn't you say you would go up and hunt up the Marks boy and the other boy?

A. No, sir.

Q. Didn't you, up at home?

A. No, sir.

Q. Answer me this, now, and be careful: Had you boys been talking about this boy at all that day?

A. No, sir.

Q. Did you mention his name?

A. No, sir.

Q. Or the Marks boys?

A. No, sir.

Q. And you never had any trouble with the Marks boys or fusses?

A. No, sir.

Q. Or with Alexander Allan, this defendant?

A. No, sir; I never had any fusses; we had talked with him the day before.

Q. No quarrels?

A. No, sir; we never had any quarrels.

Redirect examination:

The DISTRICT ATTORNEY. Have you seen this diagram of the surroundings at that place of the killing?

A. No, sir.

39 Q. Were you not down in my office when it was shown?

A. I was down there, but I never got up and looked at it.

Q. This shooting occurred after you had passed Marks's house a good ways?

A. Yes, sir.

Q. You were going across the field?

A. Yes, sir.

Q. Here runs the fence, and you were going this way, and these boys were going this way?

A. Yes, sir.

Q. That is how come you to get nearer?

A. Yes, sir.

Q. You were not going up to the house, but you were going across there?

A. Yes, sir.

Q. And they left the house to the right and they passed down the fence this way?

A. Yes, sir.

Q. They followed you along until you got there to the place where the shooting occurred, and then they halted you there and got through the fence and came to you?

A. Yes, sir.

Q. That is what you mean when you say you were not going towards them; you were approaching nearer as you went in?

A. Yes, sir.
Q. That is what you meant by that?
A. Yes, sir.
Q. There was a fence between you?
A. Yes, sir.
Q. Did you live on the said side of the field with that fence or on the opposite side; was your house on the same side of the field where the fence was, or on the opposite side?
A. Our house is on the west side of the fence.
Q. Was it on the west side of the field?
A. Yes, sir; it was on the west side and our house was in the field.
Q. How far from the fence?
A. It was about 100 yards from the west fence.
40 Q. And the other house was on the other side, how far from the fence?
A. It was a little over 100 yards.
Q. A little further than your house?
A. Yes, sir.
Q. On the other side of the fence?
A. Yes, sir; on the east side of the fence.
Q. Your house on the west side of the fence?
A. Yes, sir; our house on the west side of the fence, and about a quarter of a mile from this place.
Q. The other house was about 100 yards from the fence, west of it?
A. Yes, sir.
Q. Then you went across the field this way, going up that way?
A. Yes, sir.
Q. When these boys came out from the house and followed you along in the manner you have mentioned?
A. Yes, sir.
Witness excused.

41 WILLIE ERNE, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. W. H. H. Clayton, and testified as follows, to wit:

Question. What is your name?
Answer. Willie Erne.
Q. How old are you?
A. 14 years old.
Q. Do you know this boy here, Alexander Allan, the defendant?
A. I think I do.
Q. Where was it that you first saw him?
A. In our field, down by the creek, by the straw stack.
Q. Did you know Philip Hanson in his lifetime?
A. Yes, sir.
Q. You are a brother, I believe, to George Erne?
A. Yes, sir.
Q. George is the boy who has just left the stand?
A. Yes, sir.
Q. You say the first time you saw the defendant, Alexander Allan, was down by the creek at your place?

A. Yes, sir.
Q. Anybody with him?
A. Yes, sir; there was the largest one of the Marks's boys with him.
Q. That is not the one that was at the killing?
A. No, sir.
Q. It was the largest one?
A. Yes, sir.
Q. How long was that before Phillip was killed?
A. I believe it was a day or two; I don't know which.
Q. It was a day or two before?
A. Yes, sir.
Q. What took place down there at the creek when you first saw him?
A. The first I saw him one of the two hollered and jumped behind the brush——

Q. One of the two colored boys?

42 A. Yes, sir; and me and Phillip went down there to see who it was. When we got down there one of them asked me if I saw their horses, and I told them yes——

Q. Whose horses?
A. Mr. Morgan's.
Q. Who asked you that; do you remember?
A. No, sir; I don't believe I remember.
Q. Either the Marks boy or the defendant, Allan, asked you if you had seen Morgan's horses?
A. Yes, sir; and I told them I saw them where I came from town, on the other side of our pasture.
Q. Had you seen them there?
A. Yes, sir.
Q. Go on.
A. And he asked Phillip where was the best place to cross the creek, and Phillip said "Right there where we crossed is about as good a place as any;" and he said he would go on up; that he had crossed the creek more than once. And then I said, "You can't go up through the hog lot, for the dogs will scare the hogs."
Q. Did they have any dogs with them?
A. Yes, sir.
Q. How many?
A. Two or three.
Q. Go ahead.
A. Then they went on, went on up through the creek; I never saw them any more until the next Saturday.
Q. That is all that you remember that happened on that day, is it?
A. Yes, sir.
Q. Now, the next Saturday; go on and tell about that.
A. Well, then, the next Saturday me and George went down to a neighbor's to get some geese and goslin's, and when we came back we started fishing down to the lake.
Q. What lake is that?
A. It is a lake right out east of our house.
Q You started to go to that?
A. Yes, sir.

43 Q. How many of you?
A. Three of us, me and George and Phillip.
Q. You and your brother George and Phillip Hanson?
A. Yes, sir.
Q. Did you have anything with you?
A. We had some sticks.
Q. What kind of sticks were they?
A. White willow sticks.
Q. What did you have them with you for?
A. To kill some frogs with for bait.
Q. What direction did you go? Where did you go?
A. Right northeast.
Q. Right up the road?
A. No, sir; right through the wheat field.
Q. Go ahead?
A. When we got about half way I seen Alexander Allan and the smallest one of the Marks boys at the hogpen.
Q. That is the smallest one of the Marks boys?
A. Yes, sir.
Q. Did you know his name?
A. No, sir; I don't believe I do.
Q. It is not the same one that was down there the day before and who asked about Morgan's horses?
A. No, sir.
Q. How big a boy is he?
A. I guess he is about as big as I am.
Q. Colored boy, was he?
A. Yes, sir.
Q. You saw them at whose hogpen?
A. Marks's hogpen.
Q. Marks's hogpen is on the west side of that fence, or east side of the fence?
A. Yes, sir; on the east side.
Q. How far from the fence?
A It is right against the fence.
Q. You saw them at the hogpen?
A. Yes, sir.
Q. You had started from the house?
A. Yes, sir.
Q. What direction was the hogpen from your house?
A. It was a little more south than north.
44 Q. Which direction were you going?
A. Northeast, if I don't forget.
Q. You were going northeast and the hogpen was back this way?
A. Yes, sir; down south.
Q. You were not going towards it?
A. No, sir.
Q. When you saw them at the hogpen what were they doing? They were off there, and you were going in this direction; now, what were they doing?
A. All I know they were standing there by the hogpen.

Q. Go on then and tell where you next saw them?

A. We kept on going, and when they got to the fence Allan said to George——

Q. Were they still at the hogpen?

A. No, sir; they walked on down the fence a little and Allan said to George, "I heard you told Morgan that you drove the horses on through at 'Possum Creek so we couldn't catch them." George said, "Maybe you did;" and then he asked him where he was going, and George told him he was going fishing, and then he took his pistol out of his pocket, and gave the other boy the scabbard, and laid the pistol on the top wire and told us to stop, and we stopped, and so he came and clumb through the fence and went up to Phillip and hit him in the mouth with the left hand, and then started to shoot Phillip, and Phillip grabbed the pistol and bore down, and it' powder burned his hand, and he turned loose——

Q. Did the pistol go off?

A. Yes, sir; it went in the ground—the bullet did—and then he shot Phillip right in the left arm, right under here, and then Phillip turned and he shot him in the back, and then he went and shot George in the arm, and shot at him again.

Q. Did he say anything to you?

A. Yes, sir; he snapped the pistol at me, and told me to go.

Q. What was his exact language when he snapped the pistol?

A. He snapped the pistol at me, and said, "God damn you, get."

Q. Go ahead and tell what occurred after that.'

A. Phillip was about two steps in ahead of us, and then he told George he was going to die, to help him, and George helped him, and told me to go on home, and tell them what occurred, and then I started on home, went and told ma, and then went down and told Mr. Hanson.

Q. Did you go back to where Phillip and George were?

A. No, sir; I got the team right then, and me and my brother and Mr. Hanson went up and got Phillip and carried him down to the house.

Q. Was Phillip dead when you left?

A. He was alive before I left.

Q. Was he alive the next time you saw him?

A. No, sir.

Q. He was dead, was he?

A. Yes, sir.

Q. Do you know what became of Allan and the little Marks boy?

A. No, sir.

Q. Did you see them leave there, or did you not?

A. No, sir; I never saw them leave.

Q. How did you go down home?

A. I went afoot.

Q. Did you walk or run?

A. I run down.

Q. That is the way it happened, is it?

A. Yes, sir.

Q. Did you get over the fence?

A. No, sir.

Q. Did George or Phillip?

A. No, sir; we were all in the inside.

Q. Did you boys strike them or hit them?

A. I think Phillip hit him once, but I am not right sure.

46 Q. When was that?

A. When he was shot once, and hit him in the mouth.

Q. You think Phillip struck him, but you are not right sure about that?

A. Yes, sir.

Q. State whether anybody struck at all at either one of these boys until he struck Phillip in the mouth.

A. No, sir.

Q. Did you strike him?

A. No, sir.

Q. Did George?

A. No, sir.

Q. Did you hit him with the sticks?

A. No, sir.

Q. Did the little Marks boy get over the fence?

A. No, sir.

Q. He staid on the other side of the fence, you say, and held the scabbard?

A. Yes, sir.

Q. About how far was it from the fence to where you were, to where this boy came up to you after he threw the pistol down on the fence, how far from the fence to you?

A. About as far as from here to you, or about that distance [indicating about 10 or 12 feet] when he first told us to stop.

Q. Did you go any nearer the fence when he told you to stop?

A. No, sir.

Q. He got through the fence then and came to you folks?

A. Yes, sir.

Q. Were you armed with pistols, or guns, or knives, or anything?

A. No, sir.

Q. Did you see Phillip after they brought him back down home?

A. Yes, sir.

Q. He was dead then, was he?

A. Yes, sir.

Cross-examination by Mr. FREDERICK:

Q. Your name is Willie?

A. Yes, sir.

47 Q. How do you spell your last name?

A. E-r-n-e.

Q. You are 14 years old?

A. Yes, sir.

Q. How long had you been acquainted with Allan, this defendant?

A. I saw him a day or two before that, down on the creek; that is the first time I ever seen him.

Q. Were you acquainted with the Marks boys?

A. Yes, sir; I was acquainted with them. I didn't know their names, though. I knew them when I seen them.

Q. You saw this boy a day or two before on the creek?

A. Yes, sir.
Q. Who was with him when you saw him?
A. George and Phillip.
Q. I say who was with this boy Allan?
A. The largest one of the Marks boys.
The DISTRICT ATTORNEY. That is the first day you are inquiring about now, is it?
Mr. FREDERICK (of counsel for defense). Yes, sir. (To the witness.) Were they riding or walking?
A. Walking.
Q. What were they doing down on the creek?
A. Hunting horses, they told us.
Q. What were you boys doing down on the creek?
A. After we heard him holler we went down there to *soo* who it was.
Q. You were not down on the creek; you heard them holler down on the creek and you went down to see who it was?
A. Yes, sir.
Q How far did you have to go?
A. We had to go about 100 yards.
Q. How were they holloing?
A. They just hollered and jumped behind the brush. I didn't understand what they said.
Q. What did you go down there for?
A. We wanted to see who they were.
48 Q. Who was it went down there to see who they were?
A. Me and Phillip first and then George came.
Q. What did Phillip say to them when he went on down and found out who they were?
A. Never said anything to them, but told them where to cross the creek.
Q. What did they say to you all?
A. They asked me if I saw Morgan's horses.
Q. Asked you?
A. Yes, sir.
Q. You told them?
A. Yes, sir.
Q. What did Phillip say?
A. He didn't say anything, only told them where to cross the creek.
Q. Phillip did?
A. Yes, sir.
Q. Was there water in the creek?
A. Some places there was.
Q. Why did he have to tell them where to cross the creek; couldn't they see to get across the creek?
A. I don't know; there was a good big hole of water where they were.
Q. Where you told them to cross, was that a good place to cross?
A. Yes, sir; that is where we crossed.
Q. Did they cross there?
A. No, sir; they went up further.
Q. Did Phillip say anything to them about going up to another place to cross?

A. No, sir.
Q. Never said anything more to them?
A. No, sir.
Q. They just went on up the creek?
A. Yes, sir.
Q. Didn't say anything more, they didn't?
A. No, sir.
Q. Didn't Allan say something to Phillip?
A. He said he had crossed the creek more than once and he knew where to cross.
Q. Didn't he tell Phillip it was none of his business; he would cross the creek where he wanted to?
49 A. I don't know whether he said it was none of his business or not, but he said he knew where was a good place to cross; he had crossed more than once.
Q. Didn't Allan say, "What are you boys doing over there?"
A. Yes, sir.
Q. Who answered him; did Phillip?
A. I forget who answered him.
Q. What was the answer; didn't you say, "What is that to you?"
A. Yes, sir; I believe they did.
Q. What did Allan say back?
A. He said he didn't know it was anything, but he just wanted to know.
Q. Did you get into a fuss there?
A. No, sir; not that I know of—not much.
Q. Do you say, not that you know of; if they had got into a fuss you would have heard them talking?
A. Yes, sir.
Q. Didn't they quarrel a little bit there?
A. No, sir; not any more than what I have told you.
Q. You have not told me everything they said, have you?
A. Yes, sir.
Q. Didn't Phillip follow them along?
A. No, sir.
Q. Didn't Phillip curse them?
A. No, sir.
Q. Didn't he call him a damned son-of-a-bitch of a nigger?
A. No, sir.
Q. Or words like that?
A. No, sir.
Q. Didn't he call him a black nigger son-of-a-bitch?
A. No, sir.
Q. Didn't he call him something like that?
A. No, sir.
Q. Didn't Phillip get mad?
A. No, sir.
Q. Didn't he pull off his hat and throw it down on the ground?
A. No, sir; he never had his hat off his head.
50 Q. State, now, if he didn't pull off his hat and throw it down on the ground?
A. No, sir.

Q. Let me refresh your memory. Didn't he pull off his hat and throw it on the ground and say that he intended to kill that nigger the first chance he got?

A. No, sir.

Q. Or something like that?

A. No, sir.

Q. Nothing like that?

A. No, sir.

Q. Didn't Phillip and George follow them and throw sticks at them, and rocks?

A. No, sir.

Q. Nothing of that sort?

A. No, sir.

Q. You are sure of that?

A. Yes, sir.

Q. Did they follow them at all?

A. No, sir.

Q. Did you see them any more after they went up the creek?

A. Yes, sir; I seen them after they got up the big road.

Q. Did you say anything to them there?

A. No, sir; I was a half a mile away from there then.

Q. Did they go on through where the hogs were with their dogs?

A. No, sir.

Q. What did they say when you told them not to go on through up there where the dogs would scare the hogs?

A. They said they knew where to go across; that they had went across more than once.

Q. But they didn't go through where the hogs were?

A. No, sir.

Q. Have you and George been talking together about what occurred there that day?

A. No, sir.

Q. Haven't you told any one about what occurred there that day?

A. No; I never told any one but my father and mother.

Q. Didn't you tell it in the presence of George?

A. No, sir; I never told it, as I know of.

Q. Hasn't George told you about how it was?

51 A. Told me how it was.

Q. Yes, sir; has he not been talking to you about it?

A. No, sir.

Q. Haven't either one of you been talking together about it?

A. No, sir; I have not.

Q. Have you ever testified before as witnesses about this killing?

A. Yes, sir.

Q. Where?

A. Once up in Independence, and once down here.

Q. Before the grand jury here?

A. Yes, sir.

Q. Didn't you talk about it then up there?

A. No, sir.

Q. Didn't you and George talk about it together at Independence, Kansas?

A. No, sir.

Q. As you went on up there?

A. No, sir.

Q. Or as you came back?

A. No, sir.

Q. How many persons have you told about how it occurred?

A. I haven't told George anything about it.

Q. You have told other people?

A. I have told three men here (referring to the district attorney and assistant district attorney).

Q. Who has been talking to you about how this thing occurred?

A. There was a good many asked me.

Q. You have told a good many, haven't you?

A. No, sir.

Q. You would not tell them when they asked you?

A. No, sir.

Q. Why?

A. Because I didn't want to.

Q. You never heard about this boy accusing you all throwing rocks at him and cursing him?

A. No, sir; I think not.

Q. When you got down there on Saturday, when you started fishing, how close did you get to this defendant before he spoke to you?

A. It was a good ways, as far about as those chairs [indicating about 30 feet].

52 Q. What did he say first?

A. He told George that he heard that he told Morgan that he was a darned liar; told him that he drove the horses on the other side of the creek, and George said maybe he did.

Q. He told George what, that he was a damned liar?

A. No; he told George that he heard that he told Morgan that he drove the horses on the other side of 'Possum Creek, and George said, maybe he did.

Q. That was the first thing that he said, was it?

A. Yes, sir.

Q. Is that all George said?

A. No, sir; and then he asked him where we were going, and George told him we were going down to the lake fishing.

Q. What was Phillip saying all this time?

A. Nothing.

Q. What were you saying?

A. I didn't say anything at all.

Q. You are sure that was all that George said in reply when he said—how was that, about the horses?

A. He says, "I heard you told Morgan that we drove the horses on the other side of 'Possum Creek."

Q. This defendant said, "I heard you told Morgan that 'we,'" meaning himself?

A. Yes, sir.

Q. Had driven the horses on the other side of 'Possum Creek.
A. No; he told Morgan that we drove the horses——
Q. That you boys had driven the horses on the other side of 'Possum Creek?
A. Yes, sir.
Q. Did George deny it?
A. George said, "Well, maybe we did."
Q. Didn't deny it?
A. No, sir; that is what he said.
Q. Had you done it?
A. No, sir.
Q. You didn't do it, then?
A. No, sir.
53 Q. Yet George didn't deny it then?
A. No, sir; he said "Well, maybe we did."
Q. Had you got over the fence then?
A. No, sir.
Q. Did you get over the fence at all?
A. No, sir.
Q. You didn't get over inside next to Marks's house?
A. No, sir.
Q. Where was Allan; was he over inside next to Marks's at the time this conversation occurred?
A. He was on the outside of the fence.
Q. Next to Marks's house?
A. Yes, sir.
Q. How far from Marks's house?
A. A good little ways from the house.
Q. About how far from the house?
A. I don't know how far it was.
Q. Was it as far as the windows back there [indicating about 90 feet]?
A. Yes, sir; about that far.
Q. What was Allan doing when you first saw him?
A. He was standing right in the hog pen.
Q. What was the Marks boy doing?
A. He was standing there.
Q. What were they doing there?
A. Standing there was all I know.
Q. Were you going towards where they were?
A. No, sir.
Q. Were you going away fro' them?
A. No, sir; just cutting across.
Q. When he hollo'ed at you did you stop?
A. No, sir; we kept going.
Q. You had your back to him as you kept going, did you?
A. He kept coming up the fence too.
54 Q. You were going up the fence and he was on the other side, going up the fence?
A. Yes, sir.
Q. Then he said, "Where are you boys going?" and you said you were going over to the lake fishing?

A. Yes, sir.
Q. What did he say then?
A. He asked—he walked out and told us to stop.
Q. How far was he from you then?
A. He was about as far as from here to them tables there [indicating about 10 feet].
Q. He was on the other side of the fence then?
A. Yes, sir.
Q. Did you stop?
A. Yes, sir.
Q. You all stopped?
A. Yes, sir.
Q. Did he climb over the fence?
A. Yes, sir; he went between, through the top wire and the next one.
Q. He had to climb up, didn't he? How high is the fence?
A. The wire fence is about that high, probably [indicating about 5 or 6 feet high].
Q. It is a barb-wire fence?
A. Yes, sir.
Q. What were you doing while he was climbing over the fence?
A. We were standing there.
Q. Why didn't you go on?
A. He told us to stop.
Q. You didn't have to obey every nigger boy that told you to stop, did you?
A. No, but we just stopped; it scared us so bad we didn't know what to do.
Q. Did it scare Phillip?
A. I don't know whether it did or not.
Q. He was 18 years old, nearly a man, was he not?
A. Yes, sir; he was pretty good size.
Q. He was taller than your brother?
A. Yes, sir; a little bit.
55 Q. You boys had sticks.
A. Yes, sir.
Q. Did you use them?
A. No, sir.
Q. Did any of the boys hit him with the sticks?
A. No, sir; not for certain. I think, though, Phillip hit him once.
Q. What was George doing while Phillip was hitting him?
A. Was starting to go, run off.
Q. Didn't George hit him, too?
A. I don't know.
Q. You don't know whether George hit him or not?
A. No, sir; he never hit him.
Q. Then, he didn't hit him?
A. No, sir.
Q. Then, you are sure of that?
A. Yes, sir.
Q. You are sure George didn't hit Allan?
A. Yes, sir.

Q. You didn't hit him?
A. No, sir.
Q. But Phillip hit him once?
A. I think he did; I am not for sure.
Q. You are not sure of that?
A. No, sir.
Q. What makes you think he hit him if you are not for sure?
A. I was just turned around, and I never looked back——
Q. What makes you say you think he hit him?
A. I thought I saw him strike.
Q. Didn't you see the lick?
A. No, sir.
Q. You didnt see the lick?
A. No, sir.
Q. What was it you saw that made you think he hit him?
A. I thought I saw him going to strike.
Q. Did you see these boys when they went down there, Allan and this little Marks boy, when they went down to Marks's house?
A. No, sir.
Q. Did you see old man Marks when he left there that morning?
56 A. No, sir.
Q. Did you see a buggy or cart down there with a horse hitche' to it?
A. No, sir.
Q. You didn't see anything of that?
A. No, sir.
Q. Did you see them handling a churn or milk can, something like that?
A. No, sir.
Q. You didn't see anything of that?
A. No, sir.
Q. I am going to ask you this: Did you boys go over on the inside, cross over the fence on the same side that Marks's house is on?
A. No, sir.
Q. None of you?
A. No, sir.
Q. You are sure of that?
A. Yes, sir.
Q. I am going to ask you if you all three boys didn't get over on the inside, and if George and Phillip didn't both of them hit this boy, the defendant?
A. No, sir.
Q. Didn't they knock him down?
A. No, sir.
Q. Didn't they both strike him with their sticks after they had him down?
A. No sir.
Q. Did he not get his pistol out and shoot Phillip while he was done, while they were hitting him on the ground?
A. No, sir.
Q. None of that is so?
A. No, sir.

Q. Nothing of that sort?
A. No, sir.
Q. Never had him down at all?
A. No, sir.
Q. I am going to ask you if they didn't have him down, if Phillip didn't have him by the arm while he was down on the ground when George was hitting him while they had him down?
A. No, sir.
Q. I ask you if Allan didn't get up, and as he got up, if George did not hit him on the back of the head and knock him down
57 again with the stick?
A. No, sir.
Q. And if Allan didn't shoot at him with the pistol then?
A. No, sir.
Q. Nothing of that sort?
A. No, sir.
Q. Did these boys ever have any fuss with this nigger boy up there?
A. No, sir.
Q. Weren't you and Phillip and George wanting to whip them, because they were negro boys?
A. No, sir.
Q. When did you meet with Phillip that Saturday morning?
When we went down to get the geese.
Q. How come Phillip to go with you down there?
A. He lived right up the road, and as we went down he was out feeding the hogs, and he asked us where we were going, and we told him.
Q. Where did you tell him you were going?
A. To get some geese.
Q. Did he go with you?
A. Yes, sir; went with us to get the geese.
Q. Did you have to go by his house to get some geese.
A. Yes, sir.
Q. You came back by his house with the geese?
A. Yes, sir.
Q. Why didn't he stop there?
A. I don't know; he wanted to go fishing with us.
Q. He went on up to your house, did he?
A. Yes, sir.
Q. How long did you stay there before you left?
A. Just a few minutes.
Q. Didn't he go with you because he wanted to have some fun with you boys?
A. Not that I know of; he just wanted to go fishing.
Q. Didn't he want to go for fun with you and George, because he wanted to jump around and play around?
A. No, sir.
58 Q. Wasn't that it?
A. No, sir.
Q. What did you take to go fishing?
A. Some line and sticks to kill frogs with.
Q. Didn't you have any poles?

A. No, sir.
Q. How did you get your hooks, or did you fish with hooks?
A. We didn't use poles.
Q. How did you fish?
A. We threw the line in and fished.
Q. How would you fasten the line?
A. We would hold the line in our hand.
Q. Would you wade in?
A. No, sir.
Q. Did you have a boat?
A. No, sir.
Q. What sort of fish would you catch that way?
A. I don't know, I never tried yet.
Q. You have never tried fishing yet?
A. Yes, sir; at other places.
Q. You never fished at that pond?
A. No, sir.
Q. Never fished there since?
A. No, sir.
Q. Nor before?
A. We fished once there when the water was up.
Q. What did you take sticks along for?
A. To kill frogs.
Q. What sort of sticks were they?
A. Small willow sticks.
Q. Did you cut them there that morning?
A. Yes, sir.
Q. Green sticks?
A. Yes, sir.
Q. All three of them?
A. Yes, sir.
Q. Who cut them?
A. Phillip cut his and George cut mine.
Q. What did you cut them with, an ax?
A. We cut them with a hatchet.
Q. You cut down the little green bushes that was standing around there?
A. Yes, sir.
59 Q. You took a hatchet and chopped down the bushes?
A. Yes, sir.
Q. How long were they?
A. About that long [indicating between 3 and 4 foot].
Q. About how big were they?
A. A little bigger than my thumb.
Q. Why didn't you use a pocket knife?
A. Phillip is the only one that had a knife.
Q. He had a pretty good knife, did he not?
A. I don't know whether it was very good or not.
Q. Now then, what were you going to use these sticks for?
A. To kill frogs with.
Q. What did you want with frogs?

A. Put on our hooks to fish with.
Q. Did you ever go fishing that way before?
A. Yes, sir.
Q. Not that pond, though?
A. No, sir.
Q. Did you have to go by Marks's to get to that pond?
A. Yes, sir.
Q. What did you go down to Marks's for?
A. We was passing on the north side of Marks.
Q. You didn't have to go that way?
A. Yes, sir; to get to the lake.
Q. You never did go to that place fishing before; and you never have been there since. Why didn't you go to the place where you always went fishing before?
A. The creek was too high.
Q. Didn't you all go down there on purpose to see about these little nigger boys down there?
A. No, sir.
Q. What was said about these negroes that morning?
A. Nothing.
60 Q. Wasn't there anything said about it while you were gone down to get the geese or the poles?
A. No, sir.
Q. When you were getting the poles, didn't you say something about it?
A. No, sir.
Q. Didn't Phillip or George say something about it?
A. No, sir.
Q. Didn't you mention about this Allan boy?
A. No, sir.
Q. It wasn't mentioned at all?
A. No, sir.
Q. Why?
A. Because.
Q. You knew he was down there, didn't you; at Marks's?
A. No, sir.
Q. You knew he lived down there, didn't you?
A. I didn't know whether he was living there or not.
Q. Hadn't you heard about him living down there?
A. No, sir.
Q. You knew the Marks boys lived down there?
A. Yes, sir.
Q. Didn't you expect to see the Marks boys down there?
A. No, sir.
Q. You didn't expect to see the Marks boys?
A. No, sir.
Q. And yet you knew they lived down there?
A. Yes, sir; I knew they lived there.
Q. Were you ever down there before?
A. No, sir.
Q. Have you ever been down there since?
A. No, sir.

Q. Never was down there before or since?
A. No, sir.
Q. Did you ever have any fuss with the Marks boys, you or George?
A. No, sir.
Q. Did Phillip?
A. No, sir; not that I know of.
Q. Were you and Phillip any kin?
A. No, sir.
Q. You knew the old man Marks, did you?
A. Yes, sir.
Q. Did any women live down there?
A. Not that I know of.
61 Q. Who was keeping house?
A. I don't know.

Q. You say you had never been down there before. Had George ever been down there before?
A. Not that I know of.
(Witness excused.)

62 MAGDALINE ERNE, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. W. H. H. Clayton, and testified as follows, to wit:

Question. Your name is Magdaline Erne?
A. Yes, sir.
Q. You are the mother of these two boys who have just been on the stand?
A. Yes, sir.
Q. Did you see Phillip Hanson after he was killed?
A. Yes, sir.
Q. Where did you see him?
A. I seen him in our wheat field.
Q. How came you to go up there and see him?
A. Well, Willie came back and told me.
Q. Your little boy?
A. Yes, sir.
Q. He came back and told you?
A. Yes, sir.
Q. Then what did you do?
A. I told him to go down to the creek and hollo across the creek to Mr. Hanson's.
Q. To the father of the boy?
A. Yes, sir.
Q. Did you and Mr. Hanson go up?
A. We go up right away, and his mother went to'.
Q. Where did you find the boy?
A. In our wheat field, about 30 or 35 steps from the fence.
Q. Where was your boy George?
A. He staid there on the ground; had Phillip's head *in* his knee, hold-him up.
Q. Was Phillip alive or dead?
A. He was dead.

Q. Did you dress Phillip; you took him and attended to him, I suppose?

A. We took him home; packed him through the wheat field by ourselves, and the wagon hauled him over to Hanson's house.

Q. He was in the wheat field on your side?

A. Yes, sir.

63 Q. Did you dress him and look at his wounds after you got home?

A. Yes, sir.

Q. Where was he shot?

A. He was shot in here, and the ball staid here. He was shot in the back, and the ball staid here in front.

Q. Did you take off his clothing?

A. Yes, sir.

Q. What became of the clothing that you took off of him?

A. That shirt you have is the shirt that he had on.

Q. Is the undershirt I now exhibit to you the undershirt that he had on?

A. Yes, sir; and that other shirt you have there is the overshirt.

Q. You say that he was shot in here, under the left arm?

A. Yes, sir.

Q. What is this?

A. That is the hole where the ball went through the shirt.

Q. What is this?

A. That is the blood; I guess he held his arm that way when he walked off.

Q. You say that he was shot in the back?

A. Yes, sir.

Q. Is this the hole?

A. Yes, sir. (Referring to hole in overshirt and undershirt.)

(Undershirt and overshirt above referred to are here introduced in evidence by the district attorney, and they are shown to the jury, their attention being particularly called to the holes in them.)

Q. It was on the 14th day of May, on Saturday, that this shooting happened?

A. Yes, sir.

Q. Did you wash the body?

A. Yes, sir.

Q. And saw the bullet holes in the body?

A. Yes, sir; I saw both of them.

64 Q. Did you see Phillip on the morning he was killed?

A. I sent the boys after goslin's, and he came back with the boys when they brought the goslin's back, and they put the goslin's in the house, and then George said, "We want to go fishing."

Q. George is your son?

A. Yes, sir; my boy. He said, "We want to go fishing," and they all three stepped out of the house, and went kind of catacornered through the wheat field.

Q. Do you know where the lake is they were going to?

A. Yes, sir; I have heard the boys say; I never was at the lake.

Q. You saw them go off in that direction?

A. Yes, sir; I saw them go up northeast corner from the fence.
Q. Did you hear the shots fired?
A. No, sir.
Q. How far was it from your house where you found the body?
A. I guess about 30 or 35 yards; I never stepped it. That is just my guess.
Q. I want to ask you if you noticed, when you saw this body, any other marks of violence upon him?
A. Yes, sir; his mouth was swollen, swelled up.
Q. You found a bullet hole under the arm here, and a hole in the back where these places are on the shirts, and then you found his mouth was swelled up?
A. Yes, sir.
Q. You found two bullet holes here in front?
A. Yes, sir.
Q. Was either one of them sticking there in or under the skin?
A. You could see one right plain, and the other one you could see it a little.
Q. Did any part of the ball cut through the skin, or did you notice that?
A. One on one side was cut through the skin, was sticking out a little.
65 Q. Was the bullet mashed?
A. Yes, sir; it was mashed a little.
Q. Sticking out of the skin a little?
A. Yes, sir.
Q. Which one was tha' ?
A. The one on the left side.

Cross-examination by Mr. FREDERICK:

You say the boys were going fishing that day?
A. Yes, sir; the boys asked me if they could not go fishing.
Q. Did you ever know them to go fishing before that time?
A. Yes, sir; they went up to that lake before.
Q. Have they ever been fishing to the lake since?
A. No, sir.
Q. But they had gone to the lake before?
A. Yes, sir.
Q. How did they fish in the lake?
A. The boys say they take bullfrogs for bait.
Q. Fish with hooks?
A. Yes, sir; with hooks, and throw some lines in.
Q. What did they take with them, did you notice?
A. Yes, sir; I seen every one had sticks.
Q. What kind of sticks did they have?
A. Willow sticks; the bark peeled off.
Q. How large were the sticks?
A. About as big as my finger, maybe a little bigger.
Q. How would it compare with that chair rung?
A. Not as large as that.
Q. What did they want with those sticks?

A. The boys said they wanted them to kill bullfrogs wit' them.

Q. You never went fishing with the boys?

A. No, sir; I never went fishing in my life.

66 Q. Did you tell them not to have any fuss with those nigger boys?

A. I never knew that these boys be there.

Q. You knew that the Marks boys were down at Marks's, didn't you?

A. I never seen them Marks boys on our place before.

Q. Didn't the boys have to go by Marks's to get to the lake?

A. You can go to Marks's or you can go the other way. You don't have to go direct to Marks's; you can go kind of catacornered.

Q. They could have gone to the lake just as well without having gone to Marks's?

A. Yes, sir.

Q. You say they could go by Marks's to the lake or go another way?

A. Yes, sir; because Markes's place joins our farm on the east side, and when he wanted to go through Marks's he would go over the fence on this side, but the boys didn't want to go to Marks's.

Q. It would have been just as good a way not to have gone b' Marks's?

A. Yes, sir; because they didn't want to bother Marks to go through his horse lot. They got in our field on the northeast corner and then he goes out in the road.

Q. You see, the way they went they went down pretty close to Marks's, 35 steps from the fence. It would have been better for them to go further on up the road, and get over at another place; they could have done it just as well?

A. Yes, sir; they could have gone that way.

Q. Didn't you know about the boys having a fuss with those negro boys before?

A. No, sir.

Q. Didn't you hear them talk about it?

A. I heard them talking about the boys passing by our straw stack and asking about Morgan's horses, but they never said anything about a fuss. They said these boys were down on the creek hunting for Mor-

67 gan's horses, but they never told me anything about a fuss.

Q. Can you see Marks's house from your house?

A. Yes, sir.

Q. Can you see a person riding along there?

A. Yes, sir.

Q. Did you know who lived down at Marks's place?

A. No, sir.

Q. Did you know this boy, the defendant?

A. No, sir.

Q. Did you ever see him?

A. The first time I saw him was here in the jail when I was here a couple of months ago. I never saw him before that.

Q. Is this Phillip Hanson, the deceased, any kin to you?

A. No, sir.

Q. No kin to your folks?

A. No, sir.

Q. Didn't you know about his having any fuss with this boy, or with the Marks boys?
A. I never heard him say anything about it.
Q. How old is your boy George?
A. He is 16 years old.
Q. How old was Phillip Hanson?
A. I heard his mother say he is 18 years old; that is what his mother told me.
Q. She is here, is she not?
A. No, sir; his mother is not here.
(Witness excused.)

Here court adjourned until 8:30 o'clock a. m., Saturday, Feb. 11th, A. D. 1893.

68 SATURDAY A. M., 9 O'CLOCK—*Feb.* 11, 1893.

N. M. CLIFFORD, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. W. H. H. Clayton, and testified as follows, to wit:
Question. State your name, please.
Answer. N. M. Clifford.
Q. Where do you live?
A. I live in Coffeyville, Montgomery County, Kansas.
Q. Do you know the defendant in this case?
A. Yes, sir.
Q. I believe you arrested him, didn't you?
A. Yes, sir; I did.
Q. Do you know where Mr. Erne lives, and Mr. Hanson, Morgan, and those people down in the Indian country where this killing is said to have occurred?
A. I know where they did live at that time; Mr. Hanson has now moved away.
Q. How far is that from Coffeyville?
A. About 4 miles south of Coffeyville.
Q. In the Cherokee Nation, isn't it?
A. Yes, sir.
Q. When was it you arrested the defendant, Alexander Allan?
A. On Saturday evening, the 14th day of May, 1892.
Q. Were you an officer?
A. I was.
Q. What office did you hold?
A. United States marshal.
Q. For what district?
A. The district of Kansas.
Q. When did you first get information of the killing?
A. About 1:00 o'clock in the afternoon on the 14th day of May, 1892.
Q. Where was it?
A. In Coffeyville.
Q. You got information about 1:00 o'clock in the afternoon?
A. Yes, sir.

69 Q. Now, then, please state if you found the defendant; and, if so, where?

A. I received information that a boy had been killed, and th' young man who did the shooting had come to Coffeyville, and got off out of a cart at the Missouri Pacific Railway crossing, and had gone east on the D., M. & A. Railway track. I made some inquiries, and about half past two or a quarter of three Mr. Knotts and myself started east on the hunt of the young man.

Q. Got out of a cart at what place; did you learn?

A. I found him at Edna, Kansas.

Q. You learned that he got out of a cart at one of the depots?

A. Yes, sir.

Q. Which depot?

A. At the Missouri Pacific.

Q. He had gone in what direction?

A. East on the D., M. & A. Railway track—otherwise the Denver, Memphis & Atlantic Railway.

Q. You say you found him when?

A. About 5 o'clock.

Q. Where?

A. At Edna, De Witt County.

Q. Where is that?

A. 16 miles due east of Coffeyville. I say due east, but perhaps it was a mile north.

Q. We will say 15 miles east?

A. Yes, sir.

Q. Please state if the D., M. & A. road runs through Edna.

A. It does.

Q. You arrested him there, did you?

A. Not right at the depot; no, sir.

Q. You arrested him at Edna, didn't you?

A. I arrested him about half a quarter, I suppose, of Edna, in a wheat field.

Q. A few hundred yards?

A. Yes, sir.

Q. Two or three hundred yards east?

A. Yes, sir; about that; it was, in a manner, at Edna.

70 Mr. FREDRICK (counsel for defendant). Half a quarter from the town or depot?

A. From the depot.

The DISTRICT ATTORNEY. It is a small town?

A. Yes, sir.

Q. When you arrested him, please state if you found any arms upon him.

A. I didn't upon his person. I did in his grip.

Q. Where did you find his grip?

A. He had it with him in his hands.

Q. What arms did you find?

A. I found a 32, double action, six-shooter.

Q. Examine the pistol I now hand you and state whether or not that is the same one.

A. Yes, sir; that is it.
Q. Did it have the rubber scabbard on it I now hand you?
A. Yes, sir.
Q. Please state what condition you found it in in regard to the loads.
A. It had one load, the same as now; it has never been removed.
Q. It had one load in it?
A. Yes, sir.
Q. In this same scabbard?
A. Yes, sir.
Q. What did you do with the pistol?
A. I took the pistol, and retained it from that time until yesterday morning on my arrival here.
Q. You gave it to me then, didn't you?
A. Yes, sir.
Q. I will ask you to take that load out of the pistol now.
(Witness takes load out of pistol as requested by the district attorney.)
Q. You found it loaded just as you find it now before taking this load out?
A. Yes, sir.
71 (Here the district attorney introduced in evidence the pistol and scabbard identified by the witness.)
Q. Did you find anything else?
A. Yes, sir.
Q. What else did you find?
A. I found a knife and three empty shells and two or three pennies.
Q. Where did you find these?
A. In his pocket.
Q. See if th'se are the shells that I now hand you.
A. Yes, sir.
(Here the shells referred to by witness are introduced in evidence.)
Q. Were they in the sack they are in now, or did you put them in the sack?
A. I don't remember; I think I put them in the sack.
Q. You found no loaded shells in there?
A. No, sir.
Q. You found five empty chambers and one loaded one?
A. Yes, sir.
Q. That is all the weapon you found about him?
A. Yes, sir.
Q. Did you tell him what you arrested him for?
A. I did.
Q. What did he say to you about that?
Mr. FREDERICK (counsel for defendant). You first arrested him and then told him what you arrested him for?
The WITNESS. Yes, sir.
The DISTRICT ATTORNEY. You can state just how that happened.
A. I drove down to him in the wheat field, and I said, "Here, young man; I want you." He looked at me a minute. I said, "Nobody is going to hurt you." He put his grip in the wagon. I was in a light spring wagon, and he got in and I said, "Where is that six-shooter," and I went to search him and he said, "It is in my grip," and he gave it to

me and he gave me the six-shooter, and I said, "I am an officer
72 and want you for shooting." I first said, "I arrest you for the shooting of one young Hanson, and also for sho'ting George Erne."

Q. What did he say?

A. I don't think that he made any reply just then. I did very little talk to him; asked him a few questions afterwards.

Q. Go on; let's have the conversation you had with him.

A. I asked him what he shot the Hanosn boy for. I believe I asked him what he killed him for, and he said he didn't know that he had killed him; he shot him. I said, "What for?" and he said, "I didn't propose to be beat to death with clubs," and then I asked him, if I remember correctly—it has been so long ago, and I haven't paid any attention to it—if he did not know that he had got himself into serious trouble. He made the remark that a man in their neighborhood had shot somebody and they never did anything with him. I asked him where, and he said, "Up in Oswego," near where his home was and had been.

Q. Oswego, Kansas?

A. Yes, sir.

Q. Did you say anything to him as to the number of shots that he fired?

Mr. FREDERICK (counsel for defendant). I prefer that he ask him what he did say, if the court please.

The DISTRICT ATTORNEY. I have asked him that and he has stated. I want to call his attention to that particular thing. (To the witness.) If he stated anything except that, what was it?

A. Yes, sir; after searching him I asked him how many shots he fired, and he said one in reference to the shooting of young Hanson. I says, "What are you doing with these other empty shells?" He says, "I shot at rabbits on the road out here from Coffeyville."

73 Q. He told you that he only fired one shot at Hanson?

A. Yes, sir.

Q. Did he say anything about how he shot George Erne?

A. No, sir; I don't think that he did.

Q. He fired one shot at Hanson, and he came by his empty hulls by shooting at rabbits from Coffeyville out to Edna?

A. Yes, sir.

Q. Now, then, when he told you that he did not propose to be beaten to death with these sticks I will ask you if you examined him for the purpose of ascertaining if there was any wounds or bruises upon him.

A. Not then.

Q. Well, did you afterwards?

A. I did.

Q. Where?

A. In the commissioner's office at Independence, Kansas.

Q. What did you find?

A. I found a bruise upon his left arm.

Q. Did you find any others?

A. I did not.

Q. Did he complain of any others?

A. No, sir.

Q. What did he say about that, if anything?

A. He said the boys struck him over the arm.
Q. And you found a bruise upon the left arm?
A. Yes, sir.
Q. But nowhere else?
A. No, sir.
Q. Did he state to you anything about a quarrel or a difficulty between them; and if so, what did he say?
A. I think he did.
Q. What did he state about it?
A. If I remember correctly he simply stated that they had a little quarrel, or at least that is the substance. I asked him a very few questions, for the reason I didn't want to come to Fort Smith.
Q. What did he say about that, if anything? *If he said they*
74 Q. If he said they had a little quarrel, when was it and what about it?
A. It was at the time of the arrest, but I do not remember what he said.
Q. When was it that he told you they had a quarrel, and what about it, if you remember?
A. I don't remember.
Q. When you examined this wound what day was that—those bruises on his arm?
A. I think it was on the 16th day of May, 1892.
Q. Two days after the killing?
A. Yes, sir.
Q. You say that is the only thing that he complained of, simply that the boys had struck him over the arm?
A. That is what he told me.
Q. I will ask you if you went down to the place where this killing occurred, down to Morgan's farm?
A. I did.
Q. I believe the killing occurred on Morgan's farm; these other people were renters there?
A. Yes, sir.
Q. What day did you go down there?
A. I don't remember the day; I think it was upon my return from Independence, within three or four days, if I remember correctly.
Q. I will ask you if you went over the ground.
A. I did.
Q. You made this diagram we have here?
A. Yes, sir.
Q. Did you make measurements there and observations when you went down?
A. I did.
Q. I will ask you to explain this map to us. (Witness takes map and points out houses, farms, etc., on same.)
Q. This John Morgan that is spoken of here is a colored man, and owns this place?
A. Yes, sir.
Q. Were you taken to the place where the man was killed?
A. I was told where it was. (Witness locates on diagram where the killing is said to have occurred.)

75. Q. What appearance did you find at the place where they pointed it out that the boy had fallen?

A. The ground was badly tramped up; it was very wet.

Q. You went down some two or three days after the killing. Where did you go? To whose house?

A. I went direct to Mr. Erne's house.

Q. He is the father of these two boys who are witnesses here?

A. Yes, sir.

Q. When you got there, who did you find at the house?

A. I found Mrs. Erne and some children, and the hired man.

Q. What did you do and who was with you when you made your investigation?

A. There was a man with me by the name of Mattox came there, and I think a man that came along with him.

Q. Was there anybody there that was there at the time of the killing went with you?

A. Yes, sir.

Q. Who?

A. The smallest of the two Erne boys, Willie, I think it is.

Q. State, when you started out from the house, what you did.

A. I told him that I wanted him to show me exactly where they went, and the direction, and where each one of them were. I said "You start right out as if I wasn't here, and I will follow you," and he started right northeast from there through the wheat field, and I could see their tracks distinctly.

Q. The tracks of the three boys?

A. Yes, sir.

Q. How was the ground at that time?

A. It was wet.

Q. How was the wheat?

A. It was 12 or 15 inches; it had been so wet the wheat hadn't grown at all.

Q. About knee high?

A. Yes, sir; just about.

76 Q. You saw the tracks in that wheat field of the three boys?

A. Yes, sir.

Q. This boy went on ahead of you?

A. Yes, sir.

Q. Go on and state how far you followed those tracks.

I went on until he stopped, and he says, "It is right here where it happened." I looked, and the ground was tramped up in quite a considerable circle at that place.

Q. On which side of the fence was that?

A. That was on the west side of the division fence, between Mr. Erne and Mr. Morgan's, in Mr. Erne's wheat field.

Q. On the same side of the fence as Erne's house?

A. Yes, sir.

Q. How far from the fence was that?

A. I stepped that part of it; that was about 38 steps from the fence.

Q. From there did you see any tracks, and if so, where?

A. Yes, sir; I saw tracks from where the ground was tramped up to the fence.

Q. How many there?

A. I only saw two, if I remember right.

Q. Two tracks?

A. Yes, sir.

Q. Which way?

A. Going both ways—that is, outside of the ones we made in going and coming ourselves.

Q. You saw one track coming from the fence down there, and one going back to the fence?

A. Yes, sir.

Q. That you say was 30 steps from the fence?

A. Between 30 and 40 steps from the fence; yes, sir.

Q. I notice you have got here on the diagram three tracks running up to a point, ap'arently, and a picture of three boys; please state if
77 that on the map is the place where you found the wheat tramped down.

A. Yes, sir.

Q. From that point it is 30 steps to the fence?

A. Between 30 and 40.

Q. From that point to the fence there was one track coming and one going?

A. Yes, sir.

Q. Did you get over the fence to see if there was any tracks?

A. I did.

Q. What did you discover there?

A. I discovered tracks around there, but there was grass, short grass, eaten off, and it was hard to discover anything.

Q. You could not tell so much about that?

A. No, sir.

Q. Can you remember these distances you have got marked on this map, without having the map before you? Did you measure the distances there?

A. I measured them with a tapeline. I started and measured from where Willie stopped; where these three boys are represented to be. These boys had stopped here and the Hanson boy had f'll, and then they retraced their steps to the house. I asked him who he saw——

Q. Never mind that.

A. I measured the distance from there to the corner of the corncrib, from the bottom of the fence, or rather from the fence; that is the place where I saw the track coming from the fence and then going back, from there to the corncrib it is 15 feet. The corncrib is 7½ by 9.7. I measured then from the corner of the stable door to the northwest corner of Marks' house, and that was 85 feet. I then measured from where the party got over the fence, if anybody, over to the chicken coop, which was 30½ feet. I measured from there to the corner of the hogpen, which was 62 feet.

78 Q. Did you measure the chicken coop? How wide was it?

A. It is 7½ by 9.

Q. Did you measure from Erne's house up to where the killing occurred?

A. I stepped that. It is 621 steps.

Q. I see you have got it 1,865 feet?

A. Yes, sir; I multiplied that by three.

Q. Those are all the distances you have got on the map?

A. Yes, sir.

Q. I notice you have got Erne's pasture west of the wheat field; is that right?

A. Yes, sir.

Q. Was there a fence between the pasture and the wheat field?

A. Yes, sir.

Q. I notice three or four boys down here. That is where the boys met on the creek on Thursday?

A. Yes, sir; on Wednesday or Thursday; where they had their trouble before.

Q. I will ask you now if you know where the lake is; if they were going directly to the lake according to these tracks?

A. They were going in the direction of the lake. That creek is south of Erne's house; runs southeast.

Q. Into the Verdigris River?

A. Yes, sir; it empties into the Verdigris River.

Q. It runs between Erne's and Hanson's?

A. Yes, sir; it is called Vinegar Creek.

Q. The Verdigris River as located on this map is about right, as you have got it here, you think?

A. Yes, sir; I marked that in blue pencil.

Cross-examination:

Mr. FREDERICK. About what direction is Marks's house from Erne's?

79 A. North and east; more north than east. I want to say here the distances on the map as given are correct between one point and another, but in drawing the buildings they ought to have been drawn closer together, but the distances given here are correct.

Q. You would say generally, without being rigidly exact, that Marks's house is about east from Erne's?

A. Yes, sir.

Q. About what distance is it from Marks's house to Erne's?

A. I would have to guess at that.

Q. You have got 621 steps here from Marks's house up to this point, but that isn't in the direction the way you have got it here?

A. I would say between 400 and 500 steps, I should think. I should judge so.

Q. From Marks's house to Erne's?

A. Yes, sir.

Q. Now, what direction is this lake that is indicated on the map here from Erne's house? If you would look to the map it is northeast?

A. Yes, sir; that is the direction, northeast; I would say that is correct.

Q. What distance is it from Erne's house to the lake? You have not got it measured here?

A. I should presume it is about half a mile. I have been there, hunting, several times. I should judge it is about that distance, and perhaps a little farther.

Q. About what distance is it from Marks's house to the lake? If it is half a mile from Erne's house to the lake, and if it is 500 or 600 yards from Erne's——

A. I presume it is in the neighborhood of a quarter of a mile.

Q. Wouldn't that make the distance about the same from Marks's to the lake, and from Erne's to the lake?

80 A. Yes, sir; but I don't know that it is a quarter. It may be a little over half a mile over there to Mr. Erne's house.

Q. I say, isn't the distance about the same from Erne's to the lake as it is from Marks's to the lake?

A. There isn't much difference.

Q. If it is true that Mr. Marks's house is east of Erne's going from Mr. Marks's house to the lake you would go nearly due north; is that it?

A. No, sir; northeast.

Q. From Mr. Marks's house you would go north?

A. Yes, sir.

Q. I want to call the attention of the jury to the fact that the distances on the map are out of proportion; they are not made in the proportion to which the map ou't to be drawn. About how far did you say it was from Erne's to the lake?

A. About half a mile.

Q. About the same distance from Marks's to the lake?

A. I should think about that. I never went over that distance from Marks's to the lake. I don't suppose I ever went the distance from Mr. Erne's to the lake.

Q. Just by observation is all you know?

A. Yes, sir.

Q. Is there any road from Erne's to Marks's?

A. No, sir; only through the wheat field.

Q. Is there any road from Mr. Erne's out to this lake?

A. I think there is a road runs down here to this lane, and then you can go out this road here, up this way [indicating on diagram].

Q. From Mr. Erne's house was there any road from his house to the lake?

A. Only to go out this way through this pasture and through this gate, here [indicating on map].

Q. Is the lake on a road?

A. No, sir; the lake is on the west side of Verdigris River.

81 Q. Does it lie near the river?

A. It is perhaps a quarter of a mile from the river, perhaps a little more.

Q. These distances you give here are approximate?

A. Yes, sir; except those I have stated were actually measured.

Q. These distances you have given actually are air lines?

A. Yes, sir.

Q. These distance' you give approximately from Erne's to the lake and Marks's to the lake, they are approximate and air lines, and not with regard to the meanderings of the road?

A. Yes, sir.

Q. In going from Erne's to the lake, how much further would it be to go the road?

A. I think it would be nearly twice the distance.

Q. This country here is in farms generally?

A. Yes, sir; it is under cultivation.

Q. It is a prairie country?

A. Yes, sir.

Q. Except this timber along the Verdigris?

A. Yes, sir.

Q. This is entirely a wheat field between Erne's and Mark's, or was at that time?

A. Yes, sir.

Q. Can you see persons from Marks's house to Erne's house?

A. Yes, sir.

Q. Could you at that time?

A. You could unless they were behind buildings.

Q. I mean persons standing about; they could be seen from one place to the other?

A. I think so.

Q. You did not examine the defendant for wounds on the day you arrested him—on the 14th—for brusies?

A. I don't think I did.

Q. But on the 16th, at Independence, you noticed a bruise on his left arm?

82 A. I think it was on the 16th; it was at Independence, in the commissioner's room. He spoke to me about the boys hitting him, and I asked him where, and he said on the arm, but I never made the examination until then.

Q. I believe you stated you didn't examine very closely or carefully at that time, because you didn't want to be a witness down here?

The DISTRICT ATTORNEY. He didn't say that. He said he did not question him very closely about it.

Mr. FREDERICK (counsel for defendant). He might have mentioned other wounds, might he not?

A. He might, but he didn't.

Q. The idea I meant to convey is whether he did or not?

A. No, sir; he didn't.

Q. Did he speak about having been struck more than once, or did he say about that?

A. He didn't say anything to me about that.

Q. He first said to you that he didn't propose to be beat to death?

A. When I asked him how he come to shoot him, he said he didn't propose to be beat to death with clubs.

Q. You didn't ask him, then, whether they hit him or not, or anything about it, then?

A. No, sir.

Redirect examination by the DISTRICT ATTORNEY:

On the day you arrested him, if there had been any bruises about his head or face, wouldn't you have discovered them?

I think so, without any question about it.

Q. You saw nothing of the kind?
A. No, sir.
Q. Was there any blood on his person?
A. No, sir.
Q. Nothing of the kind?
A. No, sir.

83 Recross examination:

Mr. FREDERICK. Might there not have been bruises on his head and you not notice them?
A. I don't know that I could say that——
Q. Because you didn't examine him for wounds.
A. No, sir; I didn't examine him then.

Redirect examination:

The DISTRICT ATTORNEY. There was no complaints made; he simply said he struck him on the arm, and you saw no bruises. You examined him to see if there was bruises at the place where he said he was struck, and you found one bruise?
A. He said he was struck on the arm. That is all that was said or done.
Mr. FREDERICK (counsel for defendant). That was at Independence?
A. Yes, sir.
Witness excused.

84 JAMES A. ALDRIDGE, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. W. H. H. Clayton, and testified as follows, to wit:

Question. Your name is James A. Aldridge?
Answer. Yes, sir.
Q. Where do you live?
A. I live in the Cherokee Nation, ten miles south of the Kansas line.
Q. How far do you live from where Hanson was killed?
A. It is about ten miles.
Q. Did you know Hanson?
A. I did not.
Q. Did you know h's father?
A. No, sir; not until since this killing.
Q. Please state if after the killing of young Hanson you went up to the place; and if so, how shortly after the killing?
A. The killing was on Saturday, I believe, and Sunday morning about ten o'clock I was up to the place of the killing.
Q. What day of the month was that?
A. I don't remember now, but I believe it was the 15th.
Q. The 15th of last May?
A. Yes, sir.
Q. This was in the Cherokee Nation, Indian country?
A. Yes, sir.
Q. Now, then, state if you examined there for tracks, signs, or indications around the place of the killing; and if so, state all about it.
A. Shall I commence and state how I come to go there?
Q. Yes; you may do that.

A. On Saturday, as I was going to Coffeyville, this Mr. Hanson came very hurriedly up behind me and asked me if I had seen two col-
85 ored boys with a little gripsack, and I told him I hadn't.

Q. That is old man Hanson, the father of the young man who was killed?

A. Yes, sir; I asked him what they were wantef for——

Mr. FREDERICK. You need not go into a conversation between you and him.

The DISTRICT ATTORNEY. I submit that he may state that the old gentleman informed him about the killing to show why he went to the place.

The COURT. I think so; that does not give any facts in connection with the killing.

The WITNESS. And he told me that one of them had killed his son, and he pushed on to Coffeyville, I suppose, to get an officer to arrest the boy.

The DISTRICT ATTORNEY. You learned from him about the killing?

A. Yes, sir. I went on to Coffeyville, and staid there until Sunday morning, and as I came on back—while in Coffeyville, I heard stories that those white boys——

Mr. FREDERICK (of counsel for defense). You need not state what you heard.

The DISTRICT ATTORNEY. Go ahead.

On Sunday as I was going home I stopped up there to see the grounds where the killing took place, and I stopped at Erne's house——

Q. What do you mean when you speak of a cart?

A. I didn't speak of a cart.

Q. Didn't you say that Mr. Hanson, the old man, asked you if you saw two boyd with a cart?

A. No, sir; I said he asked me if I seen them and one of them with a little grip.

Q. On your way home on Sunday you stopped where?

86 A. At the house of Mr. Erne.

Q. You may state what observations you made there?

A. I asked Mr. Erne to show me or tell me where I could see the grounds, and he was dressing the wound of his boy, and he said to me to wait for a few minutes——

Q. Which boy?

A. The largest one of the two that is here.

Q. What kind of wounds; did you see the wound?

A. Yes, sir.

Q. What kind was it?

A. It was a flesh wound in the und'r part of the arm, between the elbow and shoulder.

Q. What was it made that?

A. It seemed to be made with a pistol ball or bullet.

Q. Did anybody else but Mr. Erne go to the point and show you the place this shooting is said to have occurred?

A. Yes, sir; this smaller boy.

Q. That is Willie?

A. Yes, sir.

Q. The boy Willie went with you?

A. Yes, sir.

Q. Now, state what you observed.

A. As soon as he had finished he said he wanted to see the grounds, too, and we started on the track of these boys who were going to fish, and we followed along the track—they were barefooted—through growing green wheat, a distance of about a quarter of a mile or a little over.

Q. Did you see the tracks?

A. Yes, sir; the tracks were plain; the ground was very soft.

Q. You tracked them through the wheat field?

A. Yes, sir.

Q. How many tracks?

A. I think three.

Q. Which way were they going?

A. They were going northeast.

Q. Northeast through the wheat field?

A. Yes, sir.

Q. Do you know where the lake is?

A. Yes, sir.

Q. What direction were they going, as to the lake?

87 A. They were going directly towards it, as straight as it was possible to walk.

Q. They went diagonally across the wheat field in a northeast direction, I believe you say?

A. Yes, sir.

Q. Go on.

A. Went something like a quarter, and probably a little over, until they came out where the shooting took place.

Q. What did you observe there? What was the appearance of the ground there?

A. The appearance was that the boys were together there, and it was tramped down there, and I saw blood.

Q. Was that in the wheat field, on the east or west side of the fence?

This boy Willie showed me where he said he held them up with the pistol——

Q. Never mind what he told you; I asked you a plain question——

A. I stepped the distance from the fence to the spot, and I think it was 38 of my steps.

Q. 38 steps from the fence?

A. Yes, sir.

Q. That is where you saw the place where it was tramped down and the place where the blood was?

A. Yes, sir.

Q. Now, then, please state if from that place to the fence you observed any tracks, and if so, what?

A. Yes, sir; there was a track from the fence to the spot of the killing, a small track.

Q. Just one track?

A. Yes, sir; coming from the fence westward.

Q. Going only one way?

A. That is all that come there.

Q. Did you see any tracks going back?

A. There was tracks around about; I could see the same looking track in other places, but it didn't go immediately back to that same place.

Q. Which way did it go, if you could tell?

A. I could not determine which way it went. There had been
88 several persons on the ground tramping around.

Q. Now, then, it was about a quarter of a mile that you found these tracks, going directly towards the lake, 38 steps from the fence where you saw the tramped place?

A. Yes, sir.

Q. And where you saw the blood?

A. Yes, sir.

Q. From the fence going to that place you saw a different track?

A. Yes, sir.

Q. A different track from the three barefooted tracks that you saw?

A. Yes, sir; it had a shoe on.

Q. The track that came from the fence to the place of the killing had shoes on?

A. Yes, sir.

Q. Now, then, did you get over the fence?

A. Yes, sir; I got over the fence close by.

Q. Could you see any tracks there?

A. No, sir; it was grass sod and I could not see any.

Q. Sod on the other side?

A. Yes, sir.

Q. Did you observe any other indications around there, any other signs or tracks?

A. No, sir; I believe not.

Q. What kind of a fence was that?

A. It was a wire fence.

Q. Do you remember how many strands?

A. There must have been five or six; I don't remember now positively.

Cross-examination by Mr. FREDERICK:

Q. Did you say one of the tracks was shoe tracks?

A. Yes, sir.

Q. What were the others?

A. I say that the track going west from the wire fence had a shoe on it, to the spot of the killing.

Q. What were the other tracks?

89 A. The other tracks that I followed up there of the boys were barefooted.

Q. All barefooted?

A. Yes, sir.

Q. You saw no other tracks there, except the one shoe track, except those which were barefooted?

A. There were large tracks of people that had been on the ground after the killing.

Q. How do you know?

A. I saw them——

Q. How do you know they were on the ground after the killing?

A. Because they tramped down the wheat.

Q. How do you know they were there after the killing?

A. The indications were they were there after the killing.

Q. What was the indications about those tracks you saw there that they were after the killing—to show that they were not there at the time of the killing?

A. Because the wheat was tramped down——

Q. Wouldn't they tramp it down at the time of the killing as well as after?

A. It was then it was tramped, I suppose, right after the killing.

Q. You suppose; now, you don't know, do you? Do you know that the other tracks you saw there were made at the time of the killing or after the killing?

A. No, sir; I don't know that.

Q. I was asking you about tracks; I was asking what was there at the time you were there? You say you saw a small shoe tracks?

A. Yes, sir.

Q. I ask you if you saw any other shoe tracks? Did you?

A. Yes, sir.

Q. How many other shoe tracks did you see?

A. I could not tell, because it was in a circle around this spot of the killing.

Q. You tracked some barefooted tracks going there; did you track some shoe tracks going there too?

A. I could track barefooted tracks about 10 feet of the center of
90 this spot of the killing, and then it was all tramped down.

Q. You told me about that—about the barefooted tracks. I am not asking you about that now. I am asking you if you tracked shoe tracks going there?

A. I could track it, I say, from the fence within ten feet——

Q. I am not asking you about that small track; I am asking you about those other shoe tracks?

A. They came in promiscuously, I suppose, from the other side of the fence; I could not tell. I understood that colored folks had been there——

Q. I am not asking you what anybody told you. I asked you if you saw how those other shoe tracks got there?

A. No, sir; I didn't.

Q. You could not track them?

A. No, sir; only around where it was all tramped up.

Q. Don't you know that a large track will make as deep an impression as a barefooted track?

A. Yes, sir.

Q. You didn't look to see how the shoe tracks got there, did you?

A. Yes, sir; there was a number of people with shoes on come from the Erne place to the place of the killing and going back.

Q. You found barefooted tracks coming from Erne's and going back, didn't you?

A. Yes, sir; there was some barefooted tracks going back, I believe.

Q. Then I am right about it. Then you did find shoe tracks going from Erne's and going back?

A. Yes, sir.

Q. And you found barefooted tracks going from Erne's and going back?

A. Yes, sir.

Q. What size track was it you saw coming from the fence out to where you saw this blood?

A. It was a small track, I would suppose about a number six shoe.

91 Q. What was the size of the other shoe tracks you saw?

A. It was smaller than some tracks that I seen.

The DISTRICT ATTORNEY. You do not understand him.

Mr. FREDERICK (of counsel for defendant). What size were the other shoe tracks?

A. They were ordinary tracks of people, I suppose from a No. 6 to a No. 7 shoe, or probably from a 6 to probably an 8.

Q. The track you saw coming from the fence out to where you saw the blood was a No. 6?

A. I don't say it was a number 6, but it seems to me that would be about the size.

Q. Now, you say that some other tracks there were from 6 to an 8?

A. Yes, sir; I should think so.

Q. Then there was a number six track coming from Erne's and going back to Erne's, wasn't there?

A. I reckon there was.

Q. You went up there and examined what you could see?

A. Yes, sir.

Q. Did you go there to hunt for some particular track, or did you go there to look to see what was there?

A. I went to make observations around there.

Q. You found number six tracks in addition to the other number six tracks you saw coming from the fence, did you?

A. Yes, sir; there had been some women from the Erne house up to the place of the killing.

Q. Did you see them?

A. No, sir; they told me——

Q. I didn't ask you to tell what they told you. Was this a woman's track, this No. 6?

A. Some women wear No. 6; in soft ground——

92 Q. You say here, about the woman proposition—were these women tracks you saw?

A. I am not able to tell.

Q. The most you can say is you suppose that it was a track made by probably a No. 6 shoe?

A. Yes, sir.

Q. Coming from the fence out to where you saw the blood?

A. Yes, sir.

Q. And that there were other shoe tracks you supposed were tracks made by No. 6 shoes?

A. Yes, sir.

Q. You don't say whether they were worn by men or women?

A. The track coming from the fence was a track seemed to be made from rather a fine shoe, or neat fitting shank; the indentation in the soft ground showed it.

Q. It looked some like a woman's shoe, did it not?

A. No, sir; I don't think it did.

Q. What was the other No. 6; that wasn't so neat fitting?

A. It didn't look like that track.

Q. That still does not answer my question. Did it look like a neat, fine shoe, the other one?

A. It was a smaller track than men wear. There were tracks from the Erne house up to the place of the killing that would be smaller than men ordinarily wear.

Q. You see, you have not answered my question yet. You go on and give us evidence about the other being a neat fitting shoe, being hollowed out in the instep—or I get that idea from you.

A. Yes, sir.

Q. And I am asking you about the other No. 6; how was that?

A. I don't remember so particularly about that.

Q. You don't remember about the track coming from Erne's, that No. 6, whether that was a neat fitting track or not?

A. No, sir.

93 Q. Can you tell us whether or not that the No. 6 track you saw coming from Erne's was the same track you saw coming from the fence out there?

A. It was not.

Q. Why do you say it was not?

A. Because the shape of the shoes didn't make the same track coming from Erne's house as this track did from the fence.

Q. You have just told us you didn't remember what sort of an impression the other No. 6 made?

A. I say it is not the same shape.

Q. If you do not remember the impression of the other No. 6, how do you know it was not the same?

A. I remember that this track from the fence was made by a track that seemed to be very crooked, the rights and left.

Q. The tracks coming from the fence seemed to be very crooked, the rights and left?

A. Yes, sir.

Q. How about the other No. 6?

A. They didn't make the same shape tracks.

Q. Did they seem to be rights and lefts?

A. It wasn't quite such a crooked shoe.

Q. You still do not answer that. If you do not know you can just say so. Did it seem to be made by a number six shoe, right and left, coming from Erne's?

A. No, sir; it didn't.

Q. You don't think they were rights and lefts?

A. No, sir; I don't.

Q. Now, then, how does it happen that you paid so particular attention to the track from there to the blood?

A. Because this little Erne boy, Willie, showed me the spot——

Q. Because you got information from others, wasn't that it?

94 The DISTRICT ATTORNEY. I insist on his answering the first question.

The COURT. Let him answer it.

The WITNESS. I looked at that track carefully with regard to its being the track that the murderer made, and I took particular notice of the shape of the track.

Mr. FREDERICK (counsel for defendant). Because you were directed to look for that track?

A. Yes, sir; he showed me that was the place where he came through the fence. I tried to track it away from the spot of the killing, but there was tramping all around there, and I could not start it away from there and determin' where he went, how he left the place.

Q. Now, then, this is the fact about it, is it not: You did not pay much attention to the tracks you saw coming from Erne's, did you?

A. Not so much; no sir.

Q. Not enough to be able to tell this jury the kind of tracks you saw?

A. Yes, sir.

Q. Now, tell them.

A. I seen there was some tracks the size of men's tracks.

Q. That is very indefinite.

A. There were tracks larger and smaller, if that will suit you.

The DISTRICT ATTORNEY. You are speaking of the ones that had boots and shoes on?

A. Yes, sir; coming from the house and going back again.

Mr. FREDERICK (counsel for defendant). That is all you noticed; that one was larger than the other?

A. Yes, sir; I noticed that the smaller tracks were not made with the same shaped shoe of this track I noticed from the fence to the spot of the killing.

95 Q. Now, tell us about the larger ones.

A. The larger ones were ordinary tracks like a man would make with a number 8 boot; I suppose a 7 or 8.

Q. Were they made with a No. 7 or 8?

A. I can't say, because the ground was shot. The ground was wet; the water standing in places.

Q. I reckon it was wet and standing in places for a number six as well as a number 8, wasn't it?

A. Yes, sir.

Q. Then your observation was just as good for one as the other?

A. There was some difference in the ground.

Q. They were both made in the same ground?

A. The ground between the Erne house and the place of the killing there were some spots of water.

Q. The number 8 or No. 6 went over the same ground?

A. Yes, sir.

Q. Then your means for observation were as good for a number 6 shoe coming from Erne's as a number 8 shoe?

A. I didn't pay as much attention to it.

Q. To which?

A. To the tracks coming from the spot of the killing to the Erne house.

Q. Did you pay any attention at all to the tracks coming from Erne's?

A. I just said there were tracks coming up and back, besides the bare-footed tracks.

Q. You didn't take any measurement of that, or any particular notice of those tracks at all?

A. I didn't take any measurements.

Q. You were not acquainted with Mr. Hanson?

A. No, sir.

Q. Were you with Mr. Erne?

A. Yes, sir; I knew the old man Erne, was all; I didn't know his family.

Q. Did you know the Marks?

A. No, sir.

96 Q. Did you know his boy?

A. No, sir.

Q. You lived ten miles from them?

A. Yes, sir; I lived down on Verdigris, ten miles below.

Q. In another neighborhood. What did you want to go and see about the place?

A. I will tell you why: Because when I was in Coffeyville that evening I heard talk that those white boys had provoked the colored boy to this outrage, and there was considerable talk on the street; and as I drove home Sunday morning I said to the man that was with me that we had plenty of time, and to let's go up and see the place for ourselves.

Q. Could you tell anything by the place whether the white boys provoked the colored boys?

A. No, sir.

Q. You went down there to get to be a witness, didn't you?

A. No, sir; if I had known it I wouldn't have gone there.

Q. You went down there to examine it in order that you might be able to vindicate the white bo's?

A. No, sir; I wanted to see for my own satisfaction.

Q. When you were down there you were hunting for testimony in favor of the white boys, didn't you?

A. No, sir; I went down to see the facts on the case.

Q. Have you got any ill feeling in this case one way or the other?

A. No, sir; I haven't—I don't know that I have.

Q. Have you any bias?

A. No, sir; they are all strangers.

Q. They are all strangers, but one is white and the other is black?

A. Yes, sir.

Q. Does that make any difference to you?

A. Yes, sir; to some extent.

Redirect examination:

The DISTRICT ATTORNEY. In the tracks that you saw, were
97 there any of these bare-footed tracks went from the place of the killing to the fence?

A. No, sir; I didn't see any.

Q. I believe you stated to Mr. Frederick you saw this track with the boot or shoe on coming from the fence to the place where you saw the

wheat mashed around, where the killing occurred, or the spot where Willie pointed out to you where the defendant got over at the fence, and where the killing was said to have occurred, where the wheat was tramped down?

A. Yes, sir.

Witness excused.

98 J. W. HAYDEN, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. W. H. H. Clayton, and testified as follows, to wit:

Question. Your name is J. W. Hayden?

Answer. Yes, sir.

Q. Do you know J. A. Aldridge?

A. Yes, sir.

Q. Were you with Mr. Aldridge on the Sunday after the killing of Hanson at Mr. Hanson's place?

A. Yes, sir.

Q. Please state if you made any observations there with regard to the tracks. I will ask you first if you saw George Erne at that place, the larger of the two Erne boys?

A. Yes, sir.

Q. What was his condition?

A. As Mr. Aldridge and myself approached the house, went to the house, the little Erne boy was in the house; Mr. Erne was dressing the wound that he received the day before.

Q. Where was he wounded?

A. In the arm.

Q. Do you remember which arm?

A. I think it was in the right arm, if I am not mistaken.

Q. What kind of a wound was that? Was it a knife or pistol or gunshot wound, or what was it?

A. I suppose it was a pistol wound, from what they say; I could not say.

Q. Did you see the wound?

A. Yes, sir.

Q. What appearance did it have? You could tell whether a hole in a man is made with a bullet or a knife, can't you?

A. Yes, sir; it was a bullet hole.

Q. Did you go out and look for the tracks with Mr. Aldridge?

A. Yes, sir; Mr. Aldridge and Mr. Erne and the small boy and

99 myself.

Q. What did you discover?

A. We traced the tracks from the Erne house to where the killing taken place.

Q. What kind of tracks were they?

A. There were three barefooted tracks.

Q. Going up through the wheat field, in what direction?

A. Northeast.

Q. Tracks of men or boys?

A. Boys.

Q. Do you know where the lake is

A. I never was at the lake.

Q. Now, then, how far did these tracks go?

A. Well, I should judge it was something over a quarter of a mile.

Q. At the end of a quarter of a mile is as far as you tracked these tracks, and what did you discover there?

A. This young Erne boy said——

Mr. FREDERICK (of counsel for defendant). Never mind what he said.

The DISTRICT ATTORNEY. He pointed out the place?

A. Yes, sir; he said, "This is the place where the killing——"

Mr. FREDERICK. Do not state what he said.

The DISTRICT ATTORNEY. I asked you if he pointed out the place where the killing occurred.

A. Yes, sir.

Q. Then what? What was the appearance of that place?

A. There was a lot of tracks around there, and some little blood there.

Q. Was the wheat tramped down?

A. Yes, sir.

Q. This was in a wheat field, was it?

A. Yes, sir.

Q. How far from the wire f'nce, in what direction?

A. Between 30 and 40 steps. I didn't step it myself. Mr. Aldridge stepped the distance from where the killing was said to have been done.

100 Q. 30 or 40 steps from the wire fence?

A. Yes, sir.

Q. On which side?

A. On the west side.

Q. That is the side that Mr. Erne lives on?

A. Yes, sir.

Q. Do you know where Marks lives, the colored man?

A. He lived east of where the killing was.

Q. On the other side of the killing?

A. Yes, sir.

Q. Now, then, you say it was 30 or 40 steps from the fence?

A. Yes, sir.

Q. Did you see these barefooted tracks coming in from there?

A. Yes, sir.

Q. Did you examine for tracks between the place where the killing is said to have occurred and the tramped-down place between that place and the wire fence?

A. Mr. Aldridge and I went to the north of the hog pen and traced one track up to the place where the killing was done.

Q. The hog pen?

A. Yes, sir; it might be a chicken house, but I think it was a hog pen.

Q. That is on the other side of the fence?

A. Yes, sir; on the east side of the fence.

Q. Did that track have a shoe on it?

A. It either had a shoe or boot; I could not say which.

Q. You tracked that to the fence, you say?

A. We tracked it from the fence to where the killing was.

Q. You tracked it from the chicken house on the other side of the fence?

A. I think that was the hog pen; that is my impression.
Q. And from the fence to the place where the killing occurred?
A. Yes, sir.
101 Q. Between the fence and where the killing occurred, did you see these barefooted tracks?
A. No, sir.
Q. Any of them?
A. No, sir.
Q. There were no barefooted tracks between the fence and that place, a space of 30 or 40 feet?
A. No, sir.
Q. You saw a track going to that place from the fence that had a boot or shoe on it?
A. Yes, sir.
Q. Could you tell about what size track that was?
A. I should judge it was about a number 7.
Q. Now, Willie, the little boy was along with you, this little boy who is here?
A. Yes, sir.
Q. And Mr. Erne himself?
A. Yes, sir.
Q. And also you may state whether there was anybody else.
A. Two small girls; I forgot about them.
Q. They were little girls?
A. Yes, sir.
Q. They are not here?
A. No, sir.

Cross-examination by Mr. FREDERICK:

Were you acquainted with this defendant before?
A. No, sir.
Q. Were you acquainted with Marks?
A. No, sir.
Q. How far did you live from Erne's or Marks's?
A. I was living with Mr. Aldridge, about ten miles from there.
Q. You are living with Mr. Aldridge?
A. Yes, sir.
Q. Were you acquainted with Erne?
A. No, sir; not personally; I know him when I see him, is all.
Q. Were you acquainted with Hanson?
102 A. No, sir; I never saw Mr. Hanson until Saturday before the killing, to my knowledge. That is the first I ever saw him.
Q. How did you happen to go up to see about the place?
A. Mr. Aldridge and I were coming from Coffeyville, Kansas, on our road home, and when we got opposite to Erne's, he said, "Let's drive over and see for ourselves about the killing." That is the way we came to be there.
Q. Ride over and see what?
A. See the grounds where he was killed on, and see the boy that was wounded.
Q. The boy that was wounded was at Erne's house?

A. Yes, sir.

Q. You didn't have to go up to Marks's——

The DISTRICT ATTORNEY. He didn't say that.

Mr. FREDERICK. He said he went there to see the boy that was wounded and he didn't have to go to the place of the killing to see the boy that was wounded.

The WITNESS. I thought you asked me how we came to go to Mr. Erne's?

Q. I did ask you that? Why did you go to the place of the killing?

A. Mr. Aldridge suggested that we go out and look over the grounds, and Mr. Erne said wait until he finished dressing these wounds and he would go t'o.

Q. You went because Mr. Aldridge said to go?

A. Yes, sir; I went because they were going.

Q. That is all the reason you went for?

A. Yes, sir; I went for that reason; I was not particularly interested in it myself.

Q. You didn't go up there with a view to examine the ground so you would be a witness in this court?

A. No, sir; but when I went I took particular notice of the grounds for fear I would be. I didn't think of it when I started.

103 Q. You took particular notice for fear you would be a witness?

A. Yes, sir.

Q. Did you notice the tracks from Erne's going out there?

A. Yes, sir; you could trace them.

Q. What tracks did you trace?

A. We traced three barefooted tracks.

Q. I will ask you if you didn't see other tracks?

A. Not on that line of tracks we didn't.

Q. Did you see any other tracks on any other line of tracks from Erne's going out there?

A. Yes, sir; there was some on the east side, some grown tracks on the east side, I suppose of these parties that carried the dead person away.

Q. You needn't suppose anything?

A. I seen the tracks, and that is what I supposed they were; I don't know.

Q. Let's not suppose anything. You did see other tracks coming from Erne's up to the place of the killing?

A. Yes, sir.

Q. Were they barefooted tracks, too?

A. No, sir; they all had on shoes on them.

Q. This track you traced over from the hogpen over on Marks's side to the place of the killing was about a No. 7?

A. Yes, sir.

Q. Did you track the track plumb to the hogpen?

A. Yes, sir; we traced it just north of the hogpen, within a few feet north of it, where it came through the fence.

The DISTRICT ATTORNEY. You didn't trace it on the other side?

A. No, sir.

Q. Then I misunderstood you.

Mr. FREDERICK. So did I. You didn't trace the track on that east side of the fence at all?

A. No, sir.

104 Q. What has that hogpen got to do with it; the hogpen was on the east side?

A. It came through the fence there; that is all. All I want to show was that it came through the fence from the hogpen.

Q. What did?

A. The track.

A. How do you know it did; you say you didn't trace it on the other side?

A. I could see the track on the other side.

Q. You could see the track?

A. Yes, sir.

Q. Well, then, we are right when we understand you to say you saw the track on the east side?

A. Yes, sir.

Q. Did you see it?

A. I saw the same track on the east side, but I didn't go over there.

Q. You saw a track on the east side?

A. Yes, sir; but I did not go there.

Q. How far from the fence did you see the track on the east side?

A. I just noticed it along the wire fence there.

Q. How far along the wire fence did the track on the east side go?

A. I noticed it some two or three steps of the same track.

Q. Some two or three steps of the same track on the east side?

A. Yes, sir.

Q. Did you see any other tracks on the east side?

A. No, sir; I didn't notice any other tracks.

Q. You thought you might be a witness and you were noticing for tracks; you say you didn't see any others?

A. No, sir.

Q. Your answer is, you didn't notice any others; couldn't you have seen them if there had been others?

A. I probably could if I had got through the fence.

105 Q. I want you to tell this jury if you could see one track, a No. 7, if there was more than one, why you could not see more than one?

A. I could not see any more tracks on the other side of the fence.

Q. That went two or three steps?

A. Yes, sir.

Q. How far were these two or three steps from the hogpen?

A. They came right from the hogpen, right north along the wire fence.

Q. Were you not mistaken awhile ago when you said you saw from the hogpen up to where you saw it went over the fence?

A. No, sir.

Q. Then you did see the tracks from the hogpen up to where it went over the fence?

A. Yes, sir.

Q. The hogpen is on the east side?

A. Yes, sir.

Q. You didn't see but two or three tracks on the east side; that is all?
A. Yes, sir.
Q. The hogpen is two or three tracks then from where it wen' over the fence?
A. Yes, sir.
Q. Have you seen this diagram?
A. I have seen it; I didn't pay much attention to it at all; I just merely seen it. (Witness is shown diagram.)
Q. This hogpen represented on the diagram is the hogpen you speak of?
A. Yes, sir.
Q. Two or three steps from the hogpen is where you saw the tracks getting over the fence?
A. Yes, sir.
Q. How far is Erne's house from Marks's place?
A. It is very nearly half a mile.
106 Q. How was the ground over on the east side by the hogpen where you saw these tracks; what was the condition of the ground at that time?
A. It was a sod—prairie sod.
A. It was a sod, prairie sod.
Q. That was in May?
A. Yes, sir.
Q. Had green grass growing on it?
A. Yes, sir.
Q. I want to ask you how it is you can see tracks on green grass?
A. The ground was mighty wet at the time, and soft.
Q. It wasn't muddy?
A. Yes, sir; it was rather muddy; it was real wet and soft.
Q. The sod, then, didn't cover the ground, did it; the green sod on the other side didn't cover the ground, did it?
A. I could not say that it did all over, but there was prairie sod all on the east side of the fence.
Q. The sod was on the east side, and yet you say the shoe made a track on the sod so you could see it?
A. Yes, sir.
Q. You saw the track where it went over the fence—you could not see where it went over the fence, could you?
A. I could see where it came through as a person would. I saw the track on the east side and then on the west side.
Q. That is the idea; you saw the track on the east side, and also saw the track on the west side?
A. Yes, sir.
Q. You don't know whether this same person made that track went over the fence or not?
A. It was the same shoe or boot, whichever it might have been.
Q. Did you measure either one of the tracks?
A. No, sir; I didn't measure either one of the tracks, but I could tell from the looks it was.
Q. Isn't that only your opinion?
A. That is my opinion.

Q. You can not swear that the tracks you saw on the east side
107 were the same tracks that were made by the same shoe on the west side?

A. I could very nearly and be safe in it. I think it was the same track.

Q. You didn't measure either one of them?

A. No, sir.

Q. All the impression of the track you saw on the east side was made on the sod?

A. Yes, sir.

Q. The green, growing grass?

A. Yes, sir.

Q. And the impression you saw on the other side was made on the soft earth?

A. In the wheat field.

Q. With that information, now, you tell this jury that the track on the east side was made by the same shoe that made the track on the west side?

A. Yes, sir; that is my opinion; it is the same track.

Q. What size were those other tracks you saw, those shoe tracks?

A. They were different sizes; they were all grown people—they looked like they were all grown people that made them.

Q. Grown people is very indefinite about the number or size of the foot. Can you give us an idea of the size of the shoe tracks you saw on the west side, not counting this one now, this No. 7 shoe?

A. There was one track I noticed in particular that made tracks there, was probably about an 8 or 9, along there; and I saw a ladies' track seemed to be, I would judge about a No. 5.

Q. You didn't see but one gentleman's track on the west side made by a shoe except this No. 7?

A. That is all.

Q. You think that was an 8 or 9?

A. Yes, sir.

Q. And the other was a ladies' track?

A. Yes, sir.

Q. No. 5, you think?

A. Yes, sir.

Q. Did you measure any tracks there at all?

A. No, sir; I did not; I didn't measure the tracks.

Q. What size were these barefooted tracks you saw?

108 A. There was one small one, and one a little larger, and another track still larger, nearly from a man's foot down to a 12 or 14 year old boy. I supposed the large track was the Erne boy; that was my opinion.

Q. I don't want you to suppose. If I was going to suppose I wouldn't suppose it was, but that is not the question. After you started you thought you might be a witness, and that is why you examined the tracks more closely?

A. Yes, sir.

Q. But you didn't do that for the purpose of being a witness in the case?

A. No, sir.

Q. Have you got any feeling or interest in this case?

A. No, sir; it is nothing to me, this case isn't.

Q. You went up there to find out the facts and make observations, and

A. I went up there just simply because I was with Mr. Aldridge? he was anxious to go to see and I happened to go along with him.

Q. Did you go up there for the purpose of finding out evidence against the boy who was said to have done the killing?

A. No, sir; I didn't, myself.

Q. You heard that he was a negro boy?

A. Yes, sir; I heard that he was a colored boy; I didn't know it.

Q. Does that make any difference in your feelings in this case?

A. No, sir; it does not; none at all.

Q. You don't know where that lake is they talk about?

A. No, sir; I never was at the lake.

Redirect examination by the DISTRICT ATTORNEY:

Had you ever been at that place before?

109 A. No, sir.

Q. This place where you found the track going to the fence, where it got over the fence, how far was it from the place of the killing—that track that went to where you saw the ground mashed down where the killing occurred—how far was was it where it got over the fence from the place where the killing occurred, where you saw the blood?

A. Between 30 and 40 steps.

Q. Was that the nearest place to the fence?

A. No; it angled a little; a person could have reached the fence a few steps nearer.

Q. But nearly opposite the fence?

A. Yes, sir.

Q. That is right, is it?

A. Yes, sir; it was a little southeast of where the killing was.

Q. But you think nearly opposite the place?

A. Yes, sir.

Q. You were never there before?

A. No, sir.

Q. You stated in your examination in chief you were not certain whether it was a hogpen or chicken coop near the place where the track got over?

Mr. FREDERICK (counsel for defendant). He corrected himself afterwards.

The DISTRICT ATTORNEY. Here is this map. Here is the chicken house within 30 feet of the place. This is not the hogpen. You see the hogpen sets back. Now, was it near the hogpen, or chicken house, or do you know?

A. It was near this building, right here [indicating on diagram].

Q. Very well; did you examine along there to see if there was any barefooted tracks passed further than where you had stood?

A. Yes, sir; we noticed in particular that the tracks did not extend on any further than this place of the killing.

Q. There was no barefooted tracks between that and the fence?

A. No, sir.

Witness excused.

110 GEORGE ERNE, having been duly recalled upon behalf of the Government, was further examined by Mr. W. H. H. Clayton, and testified as follows, to wit:

Question. I want to ask you where you were shot?

(Here witness takes off his coat from his right arm, and indicates that he was shot on the under side of the arm and about halfway between the elbow and shoulder, the shot coming out on the upper side of arm.)

Q. Please state if on the day that Phillip Hanson was killed, whether you were barefooted, you three boys, or whether you had shoes on?

A. Us three boys were barefooted.

Q. Do you know whether the defendant was barefooted or not?

A. No, sir; he had on shoes or boots.

Q. You and Hanson and Willie—all three were barefooted?

A. Yes, sir.

Q. The defendant had on either boots or shoes?

A. Yes, sir.

Q. You started to say something yesterday, when you were on the stand, about a conversation that you had the day before the killing with Morgan; what is Morgan's first name?

A. John Morgan.

Q. And you were stopped. I want to ask you now, when was it that you had this—John Morgan is a colored man who owns that place, is he not?

A. Yes, sir.

Q. When was it that you had this talk with him?

A. It was Friday.

Q. It was on Thursday that you had seen these boys down at the creek when they were looking for Morgan's horses?

A. Yes, sir.

111 Q. In the conversation with Morgan please state if you were talking about the horses?

A. Yes, sir.

Q. Now, then, that, you say, was the day before the killing?

A. Yes, sir.

Q. On the day of the killing please state if this defendant stated anything to you as to what Morgan had said to you about the horses.

A. Yes, sir; he asked me——

Q. Just tell what he said, just as if you were him. Just suppose that I were you and you him; what did he say?

A. He said, "I heard that you told Morgan;" he says, I said, I drove the horses away.

Q. That you drove the horses away? Use his own language, and don't get so mixed on that. Talk as if you were him and I were you; what did he say?

A. He said, "I heard that you said that you drove the horses away," and I said, "Yes; I guess you did hear that."

Q. Did he say who told him that?

A. No, sir; he didn't say who told him. He said he just heard it.

Q. And that was the day after you had the talk with Morgan about this matter?

A. Yes, sir.

Q. Did you learn from Morgan in that conversation anything about it?

A. No, sir; Morgan, he told me that he said that we drove the horses away, and then the next day——

Q. The next day you saw him and he told you that?

A. Yes, sir.

Q. The conversation you had with Morgan on Friday was that the defendant had told him that you drove the horses away?

A. Yes, sir.

Q. And then on Saturday, on the day of the killing, he spoke to you about that?

A. Yes, sir.

112 Q. How long was that before the killing?

A. The day before.

Q. When was it that this defendant here said to you that he heard that?

A. Saturday about noon.

Q. Does that tell me how long it was before the killing? Where was you when he said that?

A. We were up there where the killing was done when he asked me that.

Q. Did he ask you before or after he asked you if you were going fishing?

A. He asked me after he asked us if we were going fishing.

Q. He asked you that and then mentioned this other?

A. Yes, sir.

Q. You say you all three were barefooted there that day?

A. Yes, sir.

Recross-examination:

Mr. FREDERICK. You didn't tell us that yesterday, did you?

A. No, sir.

The DISTRICT ATTORNEY. About what?

Mr. FREDERICK (counsel for defendant). This conversation about Morgan.

The DISTRICT ATTORNEY. No; he started to tell it, and I stopped him.

Mr. FREDERICK (counsel for defendant). I asked him yesterday what was said at the place of the killing by Phillip or himself, or by anyone, didn't I?

A. Yes, sir; I started to answer and he (meaning the district attorney) said to leave that part out about what Morgan said.

113 Q. Leave that part out what Morgan said to you on Friday, but not what this boy said to you on Saturday. You didn't tell us that yesterday, did you?

A. No, sir.

Q. Why?

A. I didn't really think about it then.

Q. Have you been talking with your little brother since?

A. No, sir.

Q. You told us yesterday that he said to you, "Where are you boys going?"

A. Yes, sir.

Q. And you said to him, "We are going t' the lake fishing?"
A. Yes, sir.
Q. Then I asked you what else he said?
A. Yes, sir.
Q. And you said he didn't say anything else?
A. I said no; he didn't say anything else.
Q. I asked you about that yesterday?
A. Yes, sir; you asked me, but I didn't think about that.
Q. You forgot about that?
A. Yes, sir.
Q. Maybe you have forgotten something else that was said there then. What has refreshed your memory about it now, this morning?
A. I thought about it when I went out of the room yesterday evening.
Q. Did you tell your little brother Willie about it?
A. No, sir.
Q. What did you say to him when he said that to you?
A. I said, "Yes; I guess you did hear that?"
Q. What did he say then?
A. He never said anything then.
Q. He said nothing?
A. No, sir.
Q. And you said nothing?
A. No, sir; never said nothing.
Q. That was all?
A. Yes, sir.
Q. Did anyone strike Allan?
A. No, sir.
Q. Nobody struck him?
A. No, sir.
Q. Didn't Phillip hit him?
A. No, sir.
114 Q. Didn't hit him at all?
A. No, sir.
Q. You are sure of that?
A. Yes, sir.
Q. Had you ever gone fishing to the lake before?
A. No, sir.
Q. Have you ever been since?
A. No, sir.
Q. Have you ever been fishing to the lake at all?
A. Yes, sir.
Q. When, if you never went before or never since; you didn't go that day?
A. I went before that, but not since that.
Q. You did go fishing in that lake before?
A. Not the day before——
Q. I said at any time before?
A. Yes, sir.
Q. That year?
A. Yes, sir.
Q. Last year?

A. Yes, sir.
Q. Who went with you?
A. Phillip and some other boys and Willie.
Q. Willie went with you?
A. Yes, sir.
Q. You are sure of that?
A. Yes, sir.
Q. Once or twice before?
A. A couple of times.
Q. A couple of times before?
A. Yes, sir.
Q. How long before the killing?
A. About a week.
Q. How did you go?
A. I went on foot.
Q. What direction did you go, by Marks's, at that time?
A. Yes, sir.
Q. You always go by Marks's when you go there?
A. We don't go right to Marks's.
Q. You had gone before twice to the pond fishing?
A. Yes, sir.
Q. You go along close by Marks's?
A. Yes, sir.
Q. You had gone along close by Marks's both times?
A. Yes, sir.
Q. You had gone about a week before?
A. Yes, sir.
Q. Did you see any of Marks's when you went fishing before?
115 A. I saw old man Marks around the house; I never saw any of the boys.
Q. What sort of fish did you catch when you went the week before?
A. We caught about a dozen.
Q. Did you take them home with you?
A. Yes, sir.
Q. Willie was with you that day?
A. Yes, sir.
Q. And Phillip?
A. Yes, sir.
Q. Phillip always went with you when you went fishing over to the lake, the times you went?
A. No, sir; he didn't go but once.
Q. He went the last time?
A. No, sir; the first time.
Q. That was the week before?
A. Yes, sir.
Q. Then the week before was the first time you had been there——
A. No; the week before was the last time, and about 2 weeks was the first time.
Q. It had been about 2 weeks from the time of the killing that you had been first fishing in the lake, and caught about a dozen fish?
A. Yes, sir.

Q. And in about a week after that you went again?
A. Yes, sir.
Q. Who went with you the last time?
A. Me and Willie and some other boys on the river.
Q. Phillip didn't go that day?
A. No, sir.
Q. How many fish did you catch that day?
A. Two or three.
Q. Did you catch any frogs?
A. Yes, sir.
Q. You caught plenty?
A. We never counted how many we caught; we just killed them to bait the hooks with; they were little frogs.
Q. I thought they were bullfrogs?
A. No, sir.
Q. Were they toads?
116 A. No, sir; they were not bullfrogs, but these little bit of frogs.
Q. It is a fact that you had been fishing twice before, but you have not been since?
A. No, sir.
(Witness excused.)

117 N. M. CLIFFORD, having been recalled by the Government, was further examined by the district attorney, and testified as follows, to wit:

Question. These tracks that you found in the wheat field, the tracks of three boys, as you have stated, were they barefooted tracks, or did they have shoes or boots on, from the house down there?
A. They were barefooted tracks. There were other tracks.
Q. But the three that you speak of.
A. They were barefooted.
Q. The track that you say went from the place where the killing occurred over to the fence and back and again, state whether that was a barefooted track or not.
A. No, sir; it was not; or at least I didn't see any.
Q. Now, then, you saw no barefooted tracks between the fence and the place of the killing?
A. No, sir; I did not.
Q. You stated you made this diagram we have here?
A. Yes, sir.
Q. You stated on the stand before that at the place where this track went from the killing to the fence, this track you speak of that is not barefooted, which went from the place of the killing and back again, that you measured from there, and from there to the chicken house is 30 feet and 6 inches?
A. I measured from the fence to the chicken house; yes, sir.
Q. That is 30 feet and 6 inches?
A. Yes, sir.
Q. That is, the place where you tracked that track to the fence is 30 feet and 6 inches north of the chicken house?

A. How is that?

Q. The place where the track went to the fence from the place
118 of the killing, from the fence at that point to the chicken house you have got it marked 30 feet and 6 inches?

A. Yes, sir.

Q. That place is north of the chicken house, the place where the track went to the fence?

A. Yes, sir; and perhaps three or four feet west, I think.

Q. I want to get the general direction?

A. Yes, sir; it is north. [Witness is handed diagram.]

Q. You tracked that from here to the fence?

A. Yes, sir.

Q. Did that track go straight to the fence or lead to one side or the other?

A. I could not say now.

Q. You took that place where you saw that track, and from there you measured back south to the chicken house south, or nearly south, and that is 30 feet and 6 inches?

A. Yes, sir.

Q. From the chicken house to the hogpen is 62 feet?

A. Yes, sir.

Q. You arrested this defendant on the 14th, on the same day he is said to have killed Hanson?

A. Yes, sir; on the evening of the 14th.

Q. Please state if at the time you arrested him he was barefooted or had boots and shoes on?

A. He wasn't barefooted.

Q. He had either boots or shoes?

A. Yes, sir.

Q. What time did you arrest him that day?

A. About 5 o'clock, perhaps fifteen minutes afterwards.

Q. Do you remember whether he had on a boot or shoe, or can you remember about that?

A. I can only give you my best judgment.

Q. What is your judgment?

A. It was a shoe.

Q. That is your best judgment?

A. Yes, sir.

Witness excused.

119 ABNER G. THOMPSON, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. W. H. H. Clayton, and testified as follows, to wit:

Question. Your name is Abner G. Thompson?

Answer. Yes, sir.

Q. Where do you live; how far from Mr. Erne's did you live last May at the time that Hanson was killed?

A. There is no section lines to go by, but as near as I can guess it is about a mile.

Q. Did you see Phillip Hanson after he was killed?

A. Yes, sir.

Q. How long after he was killed before you saw him?
A. It was probably half an hour after he was killed.
Q. Where was it?
A. It was at Mr. Hanson's house.
Q. Did you notice any wounds upon him, and if so, where?
A. Yes, sir; I noticed two wounds.
Q. Where?
A. There was one of them right where this left arm joins onto the body, right under the arm.
Q. Right in the left armpit?
A. Yes, sir; the other one was right on the right breastbone, just to the right of the breastbone.
Q. Now, explain that. You saw one here, and one on the breastbone, here?
A. Yes, sir; I saw one went through in here under the left arm.
Q. What kind of a wound was that?
A. It was a round hole.
Q. A bullet hole?
A. Yes, sir.
Q. Then the breast, how was that?
A. It was a peice of lead, as I suppose—that is my opinion; it was lead, or had that appearance.
120 Q. Describe it. Lead isn't a wound?
A. No, sir.
Q. Now, describe the wound.
A. It was a half-circle shape cut in the flesh; looked like it had been cut by that missile on the inside.
Q. Came out?
A. Yes, sir.
Q. Was the lead there?
A. Yes, sir; the lead protruded through that half circle, the edge of it; it was flattened and turned out.
Q. The lead was still in there protruding out. It was the mashed ball, yes, sir?
A. Yes, sir.
The COURT. Whereabouts was that; in his breast?
A. Yes, sir; to the right of the breastbone.
The COURT. The bullet hole was in under the left arm?
A. Yes, sir.
The DISTRICT ATTORNEY. Did you notice or feel anything else there about the breast?
A. Yes, sir; there was a lump on the left side of the breastbone, also, but what that was I don't know. It was a substance you could move around with your finger.
Q. Did you see his back?
A. No, sir; I didn't see his back.
Q. You didn't know anything about that?
A. No, sir.
Q. You know there was one wound in here, and the ball protruded out here, flattened and sticking out a little, and cut a half circle?
A. Yes, sir; it just cut a sort of a halt circle through the flesh.

Q. Then the other was a round lump on the other side, but you didn't know anything about that?

A. No, sir.

Q. Did you see any other burises or wounds upon him?

A. I saw on his mouth—his lips were swolleb up and blackened, kind of a blue cast, and turned out considerable, looked like, by swelling, and there was a little skinned place on his chin just under his under lip. It looked like he had been struck in the mouth or hurt in some way. It looked like a brusie.

121

Q. You didn't see the back of the man?

A. No, sir.

Q. What time of day was that; you say it was about half an hour after the killing?

A. It was right near 12 o'clock, to the best of my knowledge; I didn't notice any timepeice, or take any particular note of it.

Q. Now, how far did you live from Mr. Hanson's?

A. It is just about a mile.

Q. How did you learn about the killing?

A. I was at one of our neighbors about a quarter from our house, and pretty near on a line between my house and Mr. Erne's house——

Q. You were then about a quarter of a mile nearer?

A. Yes, sir; I was about three-quarters of a mile, and Mr. Hanson's little girl came over there and told me that their brother was killed.

Q. That is the way you found it out?

A. Yes, sir.

Q. You went immediately over?

A. As quick as they told me, she says "Phillip is killed," and I said "Who killed him——?"

Q. Never mind the conversation; you went over there?

A. Yes, sir; they asked me to go, and I just picked up my hat and went right out as quick as I could go, and on the way I met Mr. Hanson in the big road leading from Coffeyville down, on what its called the Nowata and Coffeyville road.

Q. How was he?

A. He was considerably excited.

Q. Was he a horseback or on foot?

A. He was horseback, going to town.

Q. He was looking for the parties who did the killing?

A. Yes, sir; he said he was going after——

Mr. FREDERICK. Don't state what he said.

The DISTRICT ATTORNEY. No; I don't want that.

Cross-examination waived; witness excused.

122 A. W. KNOTTS, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. W. H. H. Clayton, and testified as follows, to wit:

Question. Where do you reside?

Answer. Coffeyville, Kansas.

Q. Did you live there last May?

A. Yes, sir.

Q. Do you know the defendant in this case, Alexander Allan?

A. Yes, sir.
Q. You were city marshal of Coffeyville, Kansas, were you not?
A. Yes, sir.
Q. Are you still?
A. No, sir; I am not now.
Q. Did you see this defendant after he was arrested, or did you help to arrest him?
A. Yes, sir.
Q. Who brought him down here to Fort Smith?
A. I don't know.
Q. He was arrested up at Edna, I believe?
A. Yes, sir.
Q. Did you take him from there to Coffeyville?
A. I did.
Q. Did you see any wounds or bruises or anything of that kind upon him?
A. I did not. He had a little scratch, I think, on the face; very small.
Q. I will ask you if you had any talk with him about this matter on the train?
A. Yes, sir; we talked some.
Q. Please state how the conversation came up and what was said.
A. He asked me what I thought they would do with him, is the way it first came up.
Q. Is that the way it first came up?
A. Yes, sir; of course he heard some conversation in regard to him in Edna. There was a crowd gathered up around us before we
123 started from there, and he asked me what I thought they would do with him, and I told him I didn't know; that it was hard to tell, and I asked him if he knew that he had killed that boy, and he said no, that he knew he shot him, but he didn't know that he had killed him. Then he stated that there was a man shot him in Oswego, and they never done anything with him. And I asked him what he shot that boy for, and he said he was afraid they would hurt him with them sticks. I asked him what sticks, and he said some sticks they were carrying with them. I asked him then if they struck him with their sticks, and he said no, but he was afraid they would. That is about all that was said in regard to it.
Q. Please state if at the time he was arrested there at Edna if he was barefooted, or if he had on boots or shoes?
A. He had on, if I am not mistaken, shoes. I know that he wasn't barefooted.
Q. He had on shoes, you think; you know that he wasn't barefooted?
A. Yes, sir.

Cross-examination by Mr. FREDERICK:

You were the city marshal of Coffeyville last May?
A. Yes, sir.
Q. You are not now?
A. No, sir.
Q. Has your term of office expired?
A. Yes, sir.
Q. Did you arrest this boy?

A. Mr. Clifford and I together did; I suppose we both had a hand in it.

Q. Did you and Mr. Clifford together bring him back to Coffeyville?

124 A. I brought him back with me. Clifford drove the team back.

The DISTRICT ATTORNEY. You brought him back on the cars?

A. Yes, sir.

Mr. FREDERICK (counsel for defendant). He had heard the people talk up at Edna, quite a crowd of them, I suppose?

A. Yes, sir; quite a crowd gathered around us, and some remarks made there.

Q. Wasn't there some considerable talk about it as to how it occurred?

A. We didn't stand still long enough; we were not there to exceed, I don't think, five or ten minutes.

Q. People can say a great deal in that time. I didn't ask you anything about that. I will ask you if it wasn't discussed there what the boy had done; if the people at Edna didn't know what you had arrested the boy for—or they didn't know at all, did they?

A. Yes, sir; they did.

Q. They had learned it from you and Mr. Clifford, had they not?

A. No, sir; my understanding was that the officer had been wired there from Coffeyville to look out for this man.

Q. I will ask you whether or not you and Mr. Clifford, either one of you, told them anything about what the boy was charged with?

A. I don't know what Mr. Clifford did; I didn't do it.

Q. You told the district attorney just now that you had heard a conversation at Edna about this thing?

A. The boy heard more than I did, I presume.

Q. Without any presumption at all, I am just asking you, now, trying to divert your mind to what you have already said to the jury. You say that he asked you on the train what you thought they would do with

125 him, and you answered it, and you prefaced that by saying that he had heard a conversation at Edna. The conversation at Edna was about the crime which he was charged with having committed, was it not?

A. I presume so.

Q. If you do not know, that will end it. Did he hear the conversation at Edna?

A. I will tell you, when I got to Edna——

Q. It is not necessary to say another word if you don't remember any conversation at Edna in his presence?

A. I heard one remark made by one gentleman.

Q. Is that what you meant when you told the district attorney that he heard a conversation at Edna?

A. Yes, sir.

Q. Let us see so we will understand it; one remark is one word or one sentence?

A. I can tell you what the remark was?

Q. I am not asking you 'bout that.

A. It was a proposition that a man made.

The DISTRICT ATTORNEY. I suppose somebody said something about killing him, something of the kind. I would naturally think that was the way of it.

Mr. FREDERICK (counsel for defendant). I am not asking him about that. I will ask you if you meant what you said when you told the district attorney *this* this boy heard a conversation at Edna when he asked you—— you said that in this connection: "He asked me on the train when he had heard the conversation at Edna what I thought they would do with him." Did he hear the conversation at Edna?

A. I presume he heard it; heard them talking about it. He was in the crowd when this remark was made.

Q. That is all you heard said, one remark?

A. Yes, sir.

Q. You didn't mean that he heard a conversation? One remark isn't a conversation, is it?

A. You can take it just as you want.

126 Q. I am not going to take it at all. Is one remark a conversation?

The DISTRICT ATTORNEY. You needn't answer that.

Mr. FREDERICK (counsel for defense). You told the district attorney that he had heard a conversation at Edna; now, then, you tell me that he heard one remark——

The DISTRICT ATTORNEY. That is what he meant by saying that he heard a conversation.

Mr. FREDERICK. I will ask you if one remark is a conversation. (To the court.) In answer to a question put by the district attorney, the witness said that while he was on the train going from Edna to Coffeyville, after the arrest of the defendant, the defendant asked the witness what he thought they would do with him, and the witness stated that the defendant heard a conversation at the place where he was arrested; Edna. Now, then, I ask him this: "You say he heard a conversation at Edna?" He said: "I presume it was a conversation; I heard one remark." This is the question that he has gone to sleep on. The question I have asked him is: "Is one remark a conversation?" He has told the district attorney, on direct examination, that the defendant at Edna heard a conversation, and he says now that he heard one remark, and I ask him: "Is that a conversation?"

The COURT. The jury can judge of that.

The DISTRICT ATTORNEY. He has asked this witness what a conversation was, and the witness said to him: "I heard but one remark." He then asked him whether that was a word or a sentence, and the witness said, "I can tell you what it was." Mr. Frederick then said: "I do

127 not want to know what it was." I didn't ask him what it was. Mr. Frederick then says: "You simply heard one remark," and "Is a remark a conversation?" That is not a question for the witness to answer.

The COURT. No.

The DISTRICT ATTORNEY. He can tell what he heard, and then the gentleman can judge whether it is a conversation or not.

Mr. FREDERICK (counsel for defendant). I want to know from him whether he meant when he says one remark he means a conversation. If that is what he means by a conversation he can answer that.

The COURT. You may ask that.

Mr. FREDERICK (to witness). Now, what is that? Do you mean by that one remark a conversation? Is that what you mean?

A. I told you that it is a proposition.

Q. You told me that it was one remark. I ask you, now, if that is what you meant by one proposition?

A. Yes, sir; that is it.

Q. It is?

A. Yes, sir.

Q. Have you got any ill feeling in this case, any bias or feeling against this defendant?

A. No, sir.

Q. You say this defendant told you that the didn't hit him, didn't strike him; that he was afraid they would hit him with the sticks?

A. Yes, sir.

Q. Did he tell you they didn't hit him?

A. Yes, sir. I asked him if they hit him, and he said, "No; but I was afraid they would."

Q. Who was with you when he told you that? Who heard that conversation?

A. He was there.

Q. Who else?

A. I think no one else. We were travelling on the train.

128 Q. That is while you had him under arrest?

A. Yes, sir.

Q. Did you tell him what you thought they would do with him?

A. No, sir.

Q. He asked you, but you didn't tell him?

A. I told him I didn't know; they were liable to do right smart.

Q. Then it was you asked him if the boys had hit him?

A. I asked him what he shot the boys for, and he said he was afraid they would hit him with them sticks.

Q. Then you asked him, didn't you, if they hit him with the sticks, and he said no?

A. Yes, sir; he said they didn't.

Q. They hadn't done anything to him?

A. He didn't say that. He said they didn't hit him with the sticks.

Q. Did he tell you whether or not that those boys had done anything to him?

A. He told me they had a trouble a few days before that—on or about Wednesday before that—that they had a quarrel.

Q. What was that?

A. Just something in regard to crossing a creek, and some horses; I didn't pay particular attention to it; I wasn't interested in it.

Q. You have told me that you were not interested at all. Now, tell us what he told you about it, if you can tell?

A. I don't know whether I can tell it just as he told it or not.

Q. You undertook to tell some of it.

A. He told me, I think, that him and one of the Marks boys was hunting horses, and they came up to this Erne boys somewhere during their travels, and asked them something about crossing the creek, where a good place to cross was; and I think, probably, if I am not mistaken, the Han-

son boy told him a certain place to cross, and this defendant told him that he would not cross there; that he had been there before.
129 That is about the sum and substance of it. They had quite a quarrel between them, from what he said. I believe he said they called him a damned nigger, or something like that. I don't remember all that was said in regard to it.

Q. You remember that much; keep on, and may be you will remember more.

A. I am sure that is about as far as I remember.

Q. You saw a scratch on his face?

A. Yes, sir; there was a small scratch on his face, if I am not mistaken, right under here.

Q. You didn't ask him how he got that?

A. No, sir.

Q. You didn't ask him whether or not he had any other wounds?

A. No, sir.

Q. You didn't see any wounds on him except this scratch?

A. No, sir; I did not.

Q. I want to ask you whether you didn't ask him what caused that scratch on his face; and if so, why you didn't ask him what caused it.

A. It wasn't a serious scratch—didn't amount to anything. It didn't look like it was fresh at all. It looked like it might have been done four or five days before, to me.

Q. Just an old sore on his face?

A. There was a scratch there with a scab on it.

Q. That didn't have anything to do with it, then, just an old one; it was an old sore with a scab on it?

A. Yes, sir.

Q. Did you tell him it would be best for him to tell how it was?

A. No, sir.

Q. Did he tell you to tell him how it was done, to explain to you how the shooting occurred?

A. No, sir.

Q. You didn't tell him anything about that?

A. No, sir; I just asked him if the boys hurt him; I asked
130 him if the boys hit him with the sticks.

Q. Didn't you ask him if they hurt him in any other way, or did you just simply ask him if the boys hit with the sticks?

A. Yes, sir.

Q. He just told you that the boys didn't hit him with the sticks?

A. He told me they were afraid they would hit him with the sticks. I asked him if they did hit him, and he said no.

Q. You didn't bring him down here?

A. No, sir.

Q. What did you do with him when you got him to Coffeyville?

A. I put him in the lockup, and held him until Mr. Clifford come, and turned him over to him.

Q. You say you had known the boy before, had you?

A. I saw him around town there; I wasn't personally acquainted with him.

Q. Did you know who he was working for?

A. I did not.
Q. You know the Marks folks, don't you?
A. Yes, sir; I know them.
Witness excused.

131 WILLIAM A. HANSON, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. W. H. H. Clayton, and testified as follows, to wit:

Question. State your name, please.
Answer. William A. Hanson.
Q. I believe you reside at Coffeyville now?
A. No, sir; at Sedan, Kansas.
Q. Where did you live last May?
A. In Cherokee Nation, five miles south of Coffeyville.
Q. On the Morgan place?
A. Yes, sir.
Q. You are the father of young Phillip Hanson, who was killed?
A. Yes, sir.
Q. What was his age?
A. 18 years old.
Q. What size boy was he?
A. He was very small for his age.
Q. How did he compare in size with this defendant?
A. He was not near so heavy as the defendant. He was about the height. He was very slim, very slim.
Q. About 18 years of age?
A. Yes, sir.
Q. He was a white boy, and not an Indian?
A. Yes, sir.
Q. Were you at home on the day that he was killed?
A. Yes, sir.
Q. When did you last see him alive?
A. About 11 o'clock, going across a little cornfield; going towards Mr. Erne's house.
Q. Did you know what he was going there for?
A. He went off away from my place with the boys. They said they were going out fishing.
Q. Going over to Mr. Erne's?
A. Yes, sir.
Q. Had Erne's two boys been over to your house?
A. Yes, sir.
132 Q. Did you learn from them where they were going fishing?
A. No, sir; I didn't learn the particular place.
Q. That was Saturday, was it?
A. Yes, sir; that was on Saturday the 14th day of May, 1892.
Q. And in the Indian country?
A. Yes, sir.
Q. That was about 11 o'clock?
A. Yes, sir.
Q. When did you next see your boy?
A. I think it was half past 11.

Q. About half an hour from that time?
A. Yes, sir.
Q. Was he alive or dead?
A. No, sir; he was dead.
Q. Where did you see him?
A. I saw him laying in the wheat field, laying with his head on the Erne boy's arm.
Q. Which one of the Erne boys?
A. George Erne.
Q. Was your son dead then?
A. Yes, sir.
Q. Was there anybody else there when you went up?
A. No one but George Erne when I got there.
Q. Just George Erne and the dead boy?
A. Yes, sir; when I got there.
Q. They were in your wheat field, were they?
A. They were in Mr. Erne's wheat field.
Q. Do you know how far from the wire fence?
A. I didn't make any investigation; I just kind of looked; I judge it to be about 30 yards. That would be my guess. I have never been back there to see the grounds since.
Q. About 30 yards from the fence in Mr. Erne's field?
A. Yes, sir.
Q. Do you know whether George Erne was wounded?
A. He told me that he was shot through the arm. I didn't examine it. He was holding his arm down this way, and I asked him if
133 he was hurt, and he said he was shot through the arm.
Q. He was the one that was holding your boy's head?
A. Yes, sir.
Q. Now then, when you went up there and saw your boy dead there in the field, what did you do with him?
A. As soon as Mrs. Erne got there, and my wife, we made an attempt to carry him to the house.
Q. They came after you did?
A. Yes, sir; and my oldest daughter.
Q. Who informed you of the fact he was shot?
A. I was sittin' in the house reading a newspaper and one of my little girls came and said, "Willie holloed there was some darkies shooting at Phillip."
Q. Where was Willie?
A. He was across the branch about 2 or 300 yards from my house; and my little girl was out in the yard playing when he holloed to her; and she came and told me.
Q. Then you ran out?
A. Yes, sir; I jumped right up and started. When I went out in the yard I also asked them who they were.
Q. Then what did you do with the body?
A. I took it home.
Q. Carried it home?
A. We carried it down to Mr. Erne's house and got a team there and hauled it over to my place.

Q. There is a stream between your house and Mr. Erne's?
A. Yes, sir.
Q. And the little boy came down to the creek?
A. Yes, sir.
Q. There is a little stream called Vinegar Creek, a creek running between the two places?
A. Yes, sir.
Q. You took him home?
A. Yes, sir.
Q. Did you examine for the wounds that were upon him?
A. No, sir; I got my horse and went to see if I could capture the parties that murdered him.

134 Q. Did you learn who it was that killed him?

A. The boys said it was Mr. Marks's boys that killed him. The little Erne boy said it was the Marks's boys that shot him. They lived in Coffeyville. And I got my horse and thought maybe I could catch them by the time they got to town; or, if I could not, I could have them caught.

Q. Did you go to Mark's house to see if they were there?
A. No, sir; I didn't go there.
Q. Did you go rapidly?
A. Yes, sir; as fast as my horse could carry me.
Q. Do you mean on a run?
A. Yes, sir; I whipped him right down; I got him there as quick as I could get him there.
Q. Did you make any inquiries along the road?
A. Yes, sir; I holloed at parties I passed; made inquiries as I went along. I didn't ask these boys particularly; and I understood they were afoot with a grip in their hands; and I was inquiring for two colored boys with a grip in their hands; and every party I would meet I would ask if they saw such persons.
Q. Did you learn of their going in a cart from the people along the road?
A. I understood after that they went in a cart; I did not know it at that time.
Q. Where did you first learn of them after you started? Where did you first hear of them?
A. The first I heard of them was in Coffeyville.
Q. They got there before you did?
A. Yes, sir.
Q. What kind of a vehicle is that cart you speak of?
A. Why, I don't know the cart.
Q. Do you, in speaking of a cart, mean one of these kind you haul out and dump manure in?
A. No, sir; a riding cart.

135 Q. With springs to it?

A. Yes, sir.

Q. This little one-horse vehicle with springs into it they ride around over town with?
A. Yes, sir.

Q. They got to Coffeyville before you did; you went just as fast as you could go?

A. Yes, sir; after I had carried the boy in.

Q. After you got to Coffeyville, did you hear of them being there?

A. No, sir; the first inquiry I made was for a United States marshal, and I could not find one, and I run across the city marshal.

Q. The gentleman who is here?

A. Yes, sir.

Q. What is his name?

A. Knotts.

Q. You run across him and informed him?

A. Yes, sir: I told him I wished he would make some attempt to capture the parties; that I was just about past going at the time, and they took me then and went down to the undertaker's store; they wouldn't let me go out any more. They kept me in the house until I got able to go home.

Q. When did you first learn of this boy that killed your boy?

A. Somebody came in and told me—they went up to Mr. Marks's and found out the fellow's name—it was a colored fellow that came in there a week before that.

Mr. FREDERICK (counsel for defendant). That is all incompetent.

The DISTRICT ATTORNEY. I just asked you if you learned about the whereabouts of this man when you were at the station of Coffeyville?

A. When I was at the depot, I shipped the body back to where I raised him, Chetaqua County, and there is where I first heard of it.

136 Q. Did you hear of him the day of the killing?

A. Yes, sir; that evening, about 5 o'clock.

Q. Where was your dead boy then?

A. He was in the coffin on the depot.

Q. You had him brought up to Coffeyville?

A. Yes, sir.

Q. Who brought him up?

A. Mr. Erne's team.

Q. There you had him put into a coffin, and while the dead boy was there they captured this boy and brought him back——

A. I had the coffin taken down to my place and brought him up there for the purpose of shipping him to Sedan.

Q. But you were in Coffeyville when you saw this man?

A. I was there with the body when I saw him.

Q. You were there with the body when you saw this defendant?

A. Yes, sir.

Q. If I understand you, you got on your horse and rode to Coffeyville as fast as you could get there, and you made inquiries but couldn't hear of th's boy and you told the city marshal, and they then took you around to th' undertakers, and you remained there until the body of your boy was brought in——

A. No, sir; I went home with the coffin I purchased.

Q. You went home after your boy and came back, and when you came back then they had this man under arrest there?

A. Yes, sir; brought him in on the train.

Q. That was the same day?

A. Yes, sir.
Q. What became of the Marks boy that was with him, do you know?
A. I didn't know at that time what became of him.
Q. You didn't examine the wound upon your boy, I suppose?
A. No, sir; I didn't make any thorough examination. When
137 I first went to the body where this young man was holding him I opened his shirt bosom and saw where the bullet had went in here. That is all the examination I made.
Cross-examination waived, and witness excused.
Government rests.
Here court took a recess until 1:30 p. m.
138 The defendant then introduced the following-named witnesses: Mrs. Magdaline Erne, James Marks, Harvey Marks, William Marks, Albert Marks, A. W. Knotts, Alexander Allen (the defendant), who testified as follows:

139 *Testimony introduced by defense.*

AFTERNOON SESSION, 2:45 P. M.

Mrs. MAGDALINE ERNE, having been recalled by the defense for further cross-examination, was examined by Mr. C. J. Frederick, and testified as follows, to wit:
Question. You are the mother of George Erne?
Answer. Yes, sir.
Q. On Saturday, the day that Philip Hanson was killed, were you at home?
A. Yes, sir.
Q. Were you at home when the boys started off from your house fishing?
A. Yes, sir.
Q. Was your husband at home?
A. No, sir.
Q. Was there anybody else at home but you?
A. Yes, sir; the little children.
Q. I want to ask you if your husband and little children went to town; if they were not at town?
A. No, sir; my husband was in town, but not the children. The children were at home, and the husband went to town, not the children—the children were at home.

Cross-examination by the DISTRICT ATTORNEY:

How many children have you?
A. I have got 8 children altogether.
Q. Were all the children at home?
A. Six was to home.
Q. Where were the other two?
140 A. One boy staid up with his father up in town, up in Coffeyville.
Q. What boy was that?
A. That boy be 21 years old 18th of January.
Q. What is his name?
A. John Erne.
Q. Where was the other one? There was another one 'way, wasn't there?

A. One grown boy; he is married; he was away.
Q. All the rest were home that day?
A. Yes, sir.
Mr. FREDERICK (counsel for defendant). You don't call the little ones kids, do you?
A. Yes, sir.
Q. Were they at home?
A. Yes, sir; the kids were at home.
Witness excused.

141 JAMES MARKS, having been duly sworn upon behalf of the defense, was examined by Mr. C. J. Frederick, *and* testified as follows, to wit:

Question. Your name is James Marks?
Answer. Yes, sir.
Q. Where do you live?
A. Coffeyville, in Kansas.
Q. Where did you live last May?
A. Coffeyville.
Q. Do you know this defendant Alexander Allan?
Yes, sir.
Q. Where did you know him?
A. Coffeyville.
Q. Where was he last May?
A. He was at Coffeyville.
Q. Did he live in the town of Coffeyville?
A. No, sir; he lived out on the edge of the nation.
Q. What was he doing out there in the edge of the nation?
A. Working.
Q. For whom?
A. For my father.
Q. What was he doing?
A. Plowing.
Q. Working on the farm?
A. Yes, sir.
Q. Were you out on the farm at any time in May?
A. Yes, sir.
Q. Did you see him there?
A. Yes, sir.
Q. Did you know the Erne boys and Phillip Hanson?
A. No, sir; I didn't know Phillip Hanson, the boy was killed; I seen him once.
Q. Where did you see him.
A. Down there by Erne's.
Q. Who was with you?
A. Aleck.
Q. This defendant?
A. Yes, sir.
Q. Tell us how you happened to see him.
A. I and Aleck was hunting some horses and went down there and Aleck said, "Hello, boys, what are you doing?"

142 Q. Whereabouts?
A. Down there by Erne's, by the straw stack.
Q. What did he say?
A. Alex said, "Hello, boys, what are you doing?" and he *he* said, "We are killing niggers."
Q. Who was he talking to?
A. George Erne.
Q. Who was with them?
A. Phillip Hanson and Willie Erne.
Q. What was it Alex said to him?
A. "Hello, boys, what are you doing," and they said, "Killing niggers."
Q. Who said that?
A. Phillip Hanson.
Q. Phillip said he was killing niggers?
A. Yes, sir; Alex said "Where is the best place to cross the creek at?" and they said, "Right here," and Alex said, "The water is too deep; you can't cross there," and Phillip said "God damn you, you will cross there, or no place," and Alex said "The water is too deep; we can't cross here," and Alex and I started on up the creek.
Q. How were you travelling, riding or walking?
A. Walking.
Q. State what else happened?
A. He walked ahead of us, and said, "Here, God damn you, cross here."
Q. Who said that?
A. Phillip Hanson. And Alex said, "We can't cross here; the water is too deep." Alex come on over there and caught the horse, and Phillip Hanson came over there and threw his hat down in the road and commenced cussing Alex, he said, "God damn you, I will kill you,' and wanted me to let him have the horse to catch Alex.
Q. What did Alex say to him?
A. Alex didn't say anything to him, only asked him where was the best place to cross the creek.
Q. Go on and tell all that was said.
A. He said, "God damn you, we will be up there to settle it with you Saturday." That is all I know about it.
Q. What did Alex say?
143 A. He didn't say anything; just kept going on.
Q. Did you let him have the horse?
A. No, sir.
Q. How was Alex travelling then?
A. On a little trot.
Q. Was he trotting afoot?
A. No, sir; he was riding.
Q. How many horses were you hunting?
A. Two.
Q. You got both of the horses, did you?
A. Yes, sir.
Q. You were on your horse then?
A. Yes, sir.

Q. Alex had gone on?
A. Yes, sir.
Q. Phillip Hanson wanted you to let him have your horse so he could catch Alex?
A. Yes, sir.
Q. You say that he threw it at him?
A. Yes, sir.
Q. What did he throw?
A. They throwed clubs and some rocks.
Q. Did you see them any more?
A. No, sir.
Q. You were not down there Saturday?
A. No, sir.

Cross-examination:

The DISTRICT ATTORNEY. He said "I will be up Saturday" and do what?

Settle it with you.

Q. How old are you, James?
A. 13 years old.
Q. When did Alex commence to work for your father?
A. In May.
Q. How long had Alex been down there?
A. About a month.
Q. Did Alex own a pistol?
A. Yes, sir.
Q. Did he bring his pistol with him?
A. Yes, sir.
Q. Is this it [referring to pistol heretofore introduced in evidence by the Government]?
A. Yes, sir.
Q. He brought the pistol and this scabbard with him, did he not?
A. Yes, sir.
144 Q. You have a brother younger than you, a little bit of a tod?
A. Yes, sir.
Q. When he brought that pistol down did he bring any cartridges with him when he brought the pistol?
A. I don't know, sir; if he did he kept them in his grip; he never showed them to me.
Q. Did you see his pistol?
A. Yes, sir.
Q. When did you first see his pistol?
A. When he was getting his clothes out of his grip.
Q. When was that?
A. That was directly after he came down there.
Q. Is that the only time you ever saw it?
A. No, sir; I saw it three or four times.
Q. What was he doing with it?
A. He wasn't doing anything.
Q. Do you know where he got it?
A. No, sir.
Q. Did he ever tell you?

A. No, sir.
Q. Did he ever tell you that Morgan let him have it?
A. No, sir.
Q. Did he ever tell you that his father let him have it?
A. He said his father gave it to him.
Q. Did he?
A. I reckon he did; I don't know whether he did or not.
Q. Is his father dead or alive?
A. He is alive.
Q. He told you his father gave it to him, did he?
A. Yes, sir.
Q. He told you that his mother willed it to him, did he not?
A. No, sir.
Q. But that his father gave it to him?
A. Yes, sir.
Q. Did you have any pistol—you boys?
A. No, sir.
Q. Then he brought that pistol with him when he came down to your place in May?
A. Yes, sir.
145 Q. Where were you on Saturday?
A. I was at Coffeyville.
Q. What were you doing at Coffeyville?
A. I went up there where my mother lived.
Q. Your mother lived in Coffeyville?
A. Yes, sir.
Q. Your father lived on the place?
A. Yes, sir.
Q. They didn't live together?
A. Yes, sir; they lived together, and my father owned that farm.
Q. Is your father a white man or a colored man?
A. Colored man.
Q. What is your mother?
A. A colored woman.
Q. Is your father and mother here?
A. My father is.
Q. His name is Albert, is it not?
A. Yes, sir.
Q. Is the defendant's father here?
A. No, sir.
Q. The man that gave him this pistol?
A. No, sir; he isn't.
Q. What were you doing down there at the place on the Thursday?
A. We were working.
Q. Alex had only been there two or three weeks at your place?
A. Yes, sir.
Q. You and Alex went out to hunt John Morgan's horses, did you?
A. Yes, sir.
Q. You went down on Vinegar Creek, didn't you?
A. Yes, sir.
Q. That is south of Mr. Erne's house?

A. Yes, sir.
Q. That is close to a straw stack?
A. Yes, sir.
Q. Did you expect to find horses at the straw stack?
A. No, sir.
Q. What were you doing at the straw stack?
A. We were crossing the field.
Q. You stopped down there and you saw these other boys, did you?
A. Yes, sir.
146 Q. Where were they?
A. They were across the creek.
Q. And then Alex holloed to them and said, "Hello, what are you doing over there?" didn't he?
A. Yes, sir.
Q. Did they make any answer?
A. Yes, sir; they said they were killing niggers.
Q. Did they say that before they came over to the straw stack?
A. No, sir; that was after they came across the creek.
Q. When he holloed, "Hello, what are you doing over there?" they didn't say anything until they got across where you were?
A. Yes, sir.
Q. How many niggers had they killed?
A. I don't know.
Q. They came from across the creek, did they?
A. Yes, sir.
Q. Then when they came on, did Alex speak to them again?
A. Yes, sir.
Q. What did he say?
A. He asked them where was the best place to cross the creek.
Q. Where was it that they said they were killing niggers?
A. After they came across the creek. When Alex holloed first, hollered to them and asked them what they were doing, they didn't say anything——
Q. What did Alex say to that, that made them say they were killing niggers?
A. He said, "Hello, boys, what are you doing over there?"
Q. Did he say that again?
A. No, sir; they came across the creek and they said they were killing niggers.
Q. Didn't they say they were killing "God-damned niggers?"
A. I don't know.
Q. You don't know about that?
A. No, sir.
147 Q. Do you know Mr. Clifford?
A. Yes, sir.
Q. You made a statement to him, didn't you?
A. Yes, sir.
Q. Didn't you tell him they said they were killing "God-damned niggers?"
A. I don't know.
Q. Then after they said they were killing niggers what was said?

A. They didn't say anything else, only Alex said, "Where is the best place to cross the creek?"

Q. Didn't you ask them if they hadn't seen Mr. Morgan's horses?

A. No, sir.

Q. Didn't you ask them if they had seen Morgan's horses, and didn't Phillip say, "Yes; God damn you; we run them across the river?"

A. That is after we went up there. I asked Willie Erne——

Q. You haven't mentioned that; but did he say that?

A. No, sir; Phillip said, "We run them across the river."

Q. Who was it asked the best place to cross the creek?

A. Aleck.

Q. What did Phillip say?

A. "Right there, God damn you."

Q. Then what did Alex say?

A. He said, "The water is too deep there."

Q. Then what was said?

A. He said, "Well, God damn you, cross here or no place."

Q. That is what was said?

A. Yes, sir.

Q. You are sure of that?

A. Yes, sir.

Q. Nothing else said?

A. Alex said, "The water is too deep here," and he started on up the creek; and Hanson said, "God damn you, come back here and cross;" and Alex said, "The water is too deep there;" and he said, "By God, cross there or no place," and then I and Alex went up across the
148 creek, went over there, and got the horses.

Q. That is all that was said?

A. Yes, sir.

Q. You are sure?

A. Yes, sir.

Q. Let me see if I can't tell what was said better than you can. Didn't he say, "The water is too deep to cross there," and didn't Hanson say, "Then you must walk on the water?"

A. Hanson didn't say that; no, sir.

Q. Didn't Phillip say, "Yes; I can?"

A. No, sir; Alex said—he said, "By God, that is the place we always cross," and Alex said, "You must walk on the water; and he said, "We can;" and Alex said, "I can't;" and he said, "No; there is too damned much nigger blood in you to walk on the water."

Q. That was Hanson said that to Alex?

A. Yes, sir.

Q. When Phillip Hanson said that there was too much nigger blood in Alex for him to walk on the water, what did Alex say to that?

A. He didn't say anything.

Q. Didn't say, "Yes; God damn you; you have got too much white blood?"

A. No, sir.

Q. You didn't tell Mr. Clifford that?

A. No, sir.

Q. "Alex said, 'You have got too much white blood to walk on water.'" Did you tell Mr. Clifford that?

A. No, sir; I don't believe I did.

Q. Then, "You will have to cross the creek?"

A. Yes, sir.

Q. Let me see if I can't refresh your memory a little further; see if I don't get it a little stronger yet. You walked up the creek, and didn't you say, "Come, Alex, let's go up here and cross the creek?"

A. Yes, sir.

Q. Did Phillip say anything to you then after you started away?

A. Yes, sir; he walked in front of us and told us, "God damn
149 you, come back and cross the creek there where we told you to."

Q. Then what?

A. Then we wouldn't do it; I went on up there and crossed the creek.

Q. Didn't you say, "Let's go up here, Alex, and cross the creek up here," and then you and Alex started up across the creek; and then didn't Phillip Henson say, "I don't allow any God damned nigger to walk over our place?"

A. Yes, sir.

Q. Why didn't you state it all? You see there is a great deal more than you told Mr. Frederick that you told Mr. Clifford, is there not?

A. Yes, sir.

Q. He said, "I don't allow no damned nigger to walk over our place." What did Alex say to that? He didn't say, "It is not your place; it is Morgan's place?"

A. I don't know.

Q. That is the way it is written here; you would not have told Mr. Clifford that if it had not been true?

A. No, sir.

Q. You told him that, didn't you?

(No response.)

Q. Is that right?

A. Yes, sir.

Q. When he said that, that he didn't allow any damned nigger to walk on that place, and Alex said it wasn't his place, but it was John Morgan's place; was there anything more said after that?

A. No, sir.

Q. You then went on up from there and crossed the creek?

A. Yes, sir.

Q. Caught your horses?

A. Yes, sir.

Q. After you caught the horses, did all the boys come up to where you were?

A. Yes, sir.

Q. Did they have any clubs in their hands then; big clubs?

A. Yes, sir.

150 Q. All of them had clubs?

A. Yes, sir.

Q. You see you have forgotten to tell that.

Mr. FREDERICK (counsel for defendant). I desire to ask the district attorney when and where this statement was made to Mr. Clifford.

The COURT. I do not see how it could make much difference if he admits having made them. The reason for fixing the time and place is when it is desired to impeach a witness.

The DISTRICT ATTORNEY. I will fix the time and place before I get through. (To the witness.) You say after you caught the horses——

Mr. FREDERICK (counsel for defendant). I think I have a right to insist on knowing when and where this statement was made to Mr. Clifford.

The COURT. When he comes to one the witness denies, of course you will have to fix the time and place.

Mr. FREDERICK (counsel for defendant). I ask the court to rule on this question; to require the district attorney, before he puts the question, to state the time and place where it is alleged this statement was made by the witness to Clifford.

The DISTRICT ATTORNEY. I am not asking any question at all as to what he told Mr. Clifford. I have got the paper before me, and am refreshing my own memory, and I am asking him now what was done after he caught the horses. I have got that far. (To the witness.) You say you caught the horses, and then these three boys came up with clubs?

A. Yes, sir.

Q. Why didn't you tell Mr. Frederick they came up with clubs?

A. I told him they came up with clubs and throwed them at Alex.

151 Q. You told him that Phillip throwed clubs and rocks, but you said nothing about the other boys coming, did you?

A. No, sir.

Q. Did all three of them come up?

A. Yes, sir.

Q. Did all of them throw at Alex?

A. No, sir; none but Hanson.

Q. After you caught the horses and they came up, the boys came with clubs, I will ask you if Alex didn't say to those boys, "I thought you drove the horses across the river?" and didn't Phillip say, "We did, God damn you to hell?"

A. Yes, sir.

Q. Well, you haven't mentioned that before, have you?

A. No, sir.

Q. I will ask you if Phillip didn't say to him—call him a son of a bitch, right there?

A. No, sir.

Q. He said, "We did, God damn you to hell," did he?

A. Yes, sir.

Q. Did he say anything else?

A. No, sir.

Q. Did he not say, "Have you anything to say to it?"

A. No, sir.

Q. When Alex said to Phillip, "I thought you drove the horses across the creek," didn't Phillip say, "We did, God damn you to hell. Have you anything to say about it. If you is, God damn you to hell, we can settle it pretty quick."

A. No, sir.

Q. That wasn't said?

A. No, sir.

Q. Then didn't Phillip say, "George Erne will whip you, or I could whip you myself?"

A. No, sir.

Q. Then didn't Phillip say, "Don't you say you can whip me; I can whip you so God damned quick, so God damned quick, till I wear you into a frazzel?"

A. No, sir.

Q. Then did not Alex say, "Oh, no; you can't whip anybody?"

A. No, sir.

Q. You deny that that was the way it was?

A. Yes, sir.

152 Q. Then didn't Phillip commence to curse Alex about everything that he could think of at that time, after he said all this, and didn't he say, "I will settle it Sunday instead of Saturday?"

A. No, sir; it was Saturday he said he would settle it.

Q. When Phillip wanted your horse and you wouldn't let him have it, did he say anything to you?

A. No, sir.

Q. Didn't he say this then, "I am going to beat hell out of you, and I will kill you, God damn you?"

A. No, sir.

Q. He didn't say that?

A. No, sir.

Q. Now, I will ask you if upon the 21st day of May—that would be about a week after this killing occurred—if you were in Mr. Clfford's office at Coffeyville?

A. Yes, sir.

Q. Didn't you make a statement to him that he wrote down?

A. Yes, sir.

Q. Didn't you sign your name?

A. Yes, sir.

Q. I will ask you if this isn't your signature to this paper I now hand you?

A. Yes, sir.

Q. Now, then, I will ask you if in his office, when he wrote these things down, these questions that I have asked you about to which you have said no, these things you have said didn't occur, if in his office upon that day, either the 20th or the 21st, or along there somewhere in May, in his office in Coffeyville, you didn't say to him, and if he didn't write it down as you said it—I will read this part you have answered no to—in telling about the things that occurred there, if you didn't say to him, that is, when you told him about having got the horses up, and these other boys came up there with clubs, if you didn't say to him that Phillip said to Alex

153 when Alex said to Phillip, "I thought you drove the horses across the creek," Phillip said, "We did, God damn you to hell; have you anything to say about it? If you is, God damn you to hell, we can settle it pretty quick;" and then Alex said, "George Erne will whip you, or I could whip you myself, and then Phillip said, "Don't you say you can whip me; I can whip you so God damned quick that I wear you into a frazzel," and then Alex says, "Oh, no; you can't whip nobody";

and "then Phillip commenced to curse Alex (not me) to everything that he could think of, and Alex then said, "I will settle it Sunday, and started off." Did you not tell that to Mr. Clifford?

A. I don't know sir as I did.

Q. You now say that Phillip said "We will come up th're Saturday and settle it with you." That is the way you state it now?

A. Yes, sir.

Q. You deny making the statement I have read to you. You state it is not true? Do you say you didn't make that statement to Mr. Clifford?

A. I made a statement to him; I don't know whether that was the one or not.

Q. And you stated to him "Then Alex said 'I will settle it Sunday' and started off towards home so he could get home, and then Phillip wanted me to let him have my horse to catch Alex with and I wouldn't do it, and Phillip said 'I am going to beat hell out of you, and I will kill you, God damn you.'" You say now that wasn't said. I will ask you if you didn't make that statement to Mr. Clifford as I have read it to you?

A. No, sir.

Q. And "We then went home." Now, when you got home did you and Alex talk about this thing?

A. No, sir.

Q. Not at all?

A. No, sir.

Q. You are sure of that?

A. Yes, sir.

154 Q. I will ask you if after you got home Alex didn't say to you, when you were going to milk—don't you remember you went out to milk—you milked the cows that evening—when you were going out to milk if Alex didn't say to you, speaking of Phillip, "That boy was true pluck, wasn't he?"

A. No, sir.

Q. And "He was going to kill me." Didn't Alex say that to you?

A. No, sir.

Q. I will ask you if upon the day I have stated you did not make that statement to Mr. Clifford in his office?

A. No, sir.

Q. If you didn't tell him so?

A. No, sir.

Q. You staid there until Saturday morning, did you?

A. Yes, sir.

Q. Did Alex start to town with you?

A. Yes, sir.

Q. Why did he go back?

A. To help my brother get the milk.

Q. Who is your grandpa?

A. Marks.

Q. What is his given name?

A. William Marks.

Q. Is he here?

A. Yes, sir.

Q. What did he go back in?

A. A cart.
Q. What kind of a cart?
A. A red cart.
Q. Has two wheels and a spring to it?
A. Yes, sir.
Q. It is the kind you drive around—a kind of sulky cart?
A. Yes, sir.
Q. A road cart?
A. Yes, sir.
Q. Not a farm cart that you haul out dung and dump it out, but a road cart?
A. Yes, sir.
Q. What did they do with the cart when they brought it back, when they went down there; did they take the horse out?
A. No, sir; they hitched it behind the cow lot.
155 Q. That is where they left it hitched?
A. Yes, sir.
Q. What time in the day was it he came back to help your grandpa about the milk?
A. It was my brother.
Q. He came back with your grandpa, didn't he?
A. No, sir.
Q. Did he start up to town with your grandpa?
A. Yes, sir.
Q. Did he meet your grandpa?
A. No, sir.
Q. He met your little brother, did he?
A. Yes, sir.
Q. Coming down in a cart?
A. Yes, sir.
Q. And then you and your grandpa went on?
A. Yes, sir; to town.
Q. And your little brother and he went for the milk?
A. Yes, sir.
Q. How do you know they left that cart standing out there at the lot; did you see it?
A. No, sir.
Q. How do you know it was there; they told you so, didn't they?
A. Yes, sir; and that is where the cart always stood out there. The cart stood out there by the cow lot.
Q. Were you going down there to milk, and put the milk in the cart, and carry it up to town and sell it; is that it?
A. Yes, sir.
Q. When you started to town, and Alex started, who got the pistol when you started to town, you or Alex?
A. I didn't.
Q. Did Alex?
A. No, sir.
Q. What were you going to town for; to have a little fun?
A. Yes, sir.
Q. Where did Alex get his pistol?

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A. Alex didn't have his pistol when we started to town, I and my grandpa.

Q. How do you know he didn't?

A. I know he didn't, because we didn't see him with it; he had it in his grip.

156 Q. Then he didn't carry his pistol with him when he went to town?

A. No, sir.

Q. He must have got it after he came back?

A. Yes, sir.

Q. You are sure he didn't have his pistol when he went to town?

A. Yes, sir.

Q. Did he tell you that he didn't have it?

A. Yes, sir.

Q. How come him to tell you that he didn't have his pistol?

A. My pa didn't allow him to carry his pistol backwards and forwards to town with him.

Q. Then you say that he told you he didn't have the pistol?

A. Yes, sir.

Q. How come him to tell you that?

A. My grandpa asked him if he had the pistol, and he said, "No, I left it at home in my grip."

Q. Your grandpa asked him while you were going to town, if he had his pistol?

A. Yes, sir.

Q. How come him to ask him that?

A. Because he knew my pa did'nt want him to carry it.

Q. Then he didn't have the pistol with him?

A. No, sir.

Q. Do you know where he got the pistol?

A. No, sir.

Q. Has he ever told you?

A. No, sir.

Q. You didn't go back with your brother?

A. No, sir.

Q. Which one of your brothers was that?

A. Harvey.

Q. Is that the little fellow?

A. Yes, sir.

Q. When did you next see Alex?

A. To-day.

Q. To-day is the first time you have seen him since?

A. Yes, sir.

Q. He didn't hunt you up when he came to town?

A. No, sir.

157 Q. Did you know that he had come to town?

A. No, sir; I did not know he had come until my brother came and told me.

Q. Did you ever see him have the pistol shooting at marks or anything of that kind?

A. Yes, sir.

Q. You don't know anything about the shooting, I believe, you say?
A. No, sir.
Q. You were not down there?
A. No, sir.
Q. What time in the day was it you went out to look after these horses?
A. About 3:00 o'clock.
Q. You went out to look for them for Morgan, didn't you?
A. Yes, sir.
Q. Did Morgan pay you anything to go?
A. No, sir.
Q. You brought the horses back, did you?
A. Yes, sir.
Q. Did you tell Morgan what had happened?
A. Yes, sir.
Q. Did you tell him that these boys said that they had driven the horses across the creek?
A. Yes, sir.
Q. You had a talk with Morgan about it?
A. Yes, sir.
Q. Isn't this Morgan's pistol (referring to pistol heretofore introduced in evidence)?
A. No, sir.
Q. Are you sure it is not?
A. Yes, sir.
Q. Did Morgan tell you boys anything to do?
A. No, sir.
Q. Morgan is a colored man?
A. Yes, sir.
Q. Did you tell Morgan that the boys threw rocks at Alex?
A. Yes, sir.
Q. Did Morgan tell you to do anything about that?
A. No, sir.
Q. What did he say to you about it?
A. He never said anything.
Q. You are right sure of that?
A. Yes, sir.
Q. You are right sure he didn't say anything to you?
158 A. Yes, sir.
Q. Where is Morgan?
A. In Coffeyville.
Q. He is not here?
A. No, sir.
Q. How old is your brother?
A. 12 years old.
Q. What is your brother's name?
A. Harvey.

Redirect examination by Mr. FREDERICK:

How come you to make this statement to Mr. Clifford?
A. He told me to; he had me to make it to him.
Q. Did you read it over, what he had written down for you?
A. No, sir.

Q. Did he read it over to you?
A. No, sir.
Q. Did you sign it?
A. Yes, sir.
Q. What did you sign it for unless he read it to you?
A. He told me to sign my name to it.
Q. Who was present when you signed your name to it?
A. My brother.
Q. Which brother?
A. Harvey.
Q. Did he take the statement of Harvey, too?
A. Yes, sir.
Q. He wrote down his statement?
A. Yes, sir.
Q. Did he write down what anybody else knew about it?
A. No, sir.
Q. What did he do with the paper that he wrote down the statements upon?
A. I don't know, sir.
Q. What did he want you to sign your name to the paper for; what did he say he was going to do with the paper?
A. I don't know, sir.
159 Q. He didn't tell you?
A. No, sir.
Q. Was your father with you?
A. Yes, sir.
Q. Your father was along?
A. He wasn't in there when we made the statement.
Q. Who was in the room when he was writing it down?
A. My little brother.
Q. No one else?
A. No, sir.
Q. He is the only one you told it to, then?
A. Yes, sir.
Q. Did you have a talk with anybody for the defendant, Alexander Allan, until you came down here yesterday evening and talk' with me?
A. Yes, sir.
Q. Who?
A. I talked with a lawyer in Independence.
Q. What was his name?
A. I don't know, sir.
Q. Did you give your testimony at Independence?
A. Yes, sir.
Q. Before you gave this statement?
A. No, sir; afterwards.
Q. Did they have this statement at Independence?
A. I don't know.
Q. Did they have a written statement up there?
A. I don't know, sir; I didn't go in the court room.
Q. Were you sworn as a witness up there at Independence?
A. Yes, sir.

Q. But they didn't ask you any questions?
A. No, sir.
Q. They didn't ask you any questions at all?
A. No, sir; just the lawyer told them how it was, and that is all.
Q. Do you know where this defendant's father is?
A. No, sir.
Q. Have you ever seen his father since he killed Phillip?
A. No, sir.
Q. Did you ever see him at all?
A. Yes, sir.
160 Q. You have seen his father?
A. Yes, sir.
Q. You say you have seen the defendant shoot with his pistol?
A. Yes, sir.
Q. What did he have a pistol for?
A. I don't know, sir.
Q. Where did you see him shooting the pistol?
A. Down on the farm.

Recross-examination by the DISTRICT ATTORNEY:

Who was down at the straw stack besides you and Allan?
A. Willie Erne, George Erne, and Phillip Hanson.
Q. Was your little brother with you?
A. No, sir.
Witness excused.

161 HARVEY MARKS, having been duly sworn upon behalf of the defendant, was examined by Mr. C. J. Frederick, and testified as follows, to wit:

Question. What is your name?
Answer. Harvey Marks.
Q. Where do you live?
A. Coffeyville, Kansas.
Q. Do you know the defendant, Alexander Allan here?
A. Yes, sir.
Q. Where did he live before he got into this trouble?
A. In Oswego.
Q. Where was he living at the time the difficulty happened?
A. Down to my pa's farm.
Q. That is down close to Coffeyville, is it?
A. Yes, sir.
Q. Were you with him the day the shooting took place?
A. Yes, sir.
Q. How come you to be down there?
A. I went down after some cream.
Q. Now, tell us where you came from, and how you happened to go down there.
A. I come from Coffeyville, and he was in a wagon with my grandpa going up to Coffeyville and I met him and he got out and come back to help me lift the cream and the churn into the cart.
Q. You were going down to the farm?

A. Yes, sir.
Q. Who did you meet?
A. Alex and my brother and grandpa.
Q. How come Alex to get into the buggy and go with you down to the farm?
A. He went down to help me get the milk.
Q. Who told him to go?
A. My grandpa sent him.
Q. Told him to go and help you with the churn and milk?
A. Yes, sir.
162 Q. He went with you down there, did he?
A. Yes, sir.
Q. What did you do after you got down there?
A. We skimmed the milk and put it in the churn.
Q. What else?
And we took it and went on out, carried it outdoors, and then seen the boys climb through the fence.
Q. Who?
A. George Erne and Willie and Phillip Hanson.
Q. Where were they coming?
A. Coming through the fence.
Q. How far were they from you?
A. About 40 steps.
Q. Where did they go to?
A. They came walking on up there towards the house, and Alex said, "Hello," and they said, "Hello, God damn you."
Q. Alex said what?
A. He said, "Hello" to them boys.
Q. What did they say?
A. They said, "Hello, God damn you."
Q. Which one said that?
A. Phillip Hanson.
Q. What did Alex say then?
A. Alex didn't say anything; Alex asked them what they wanted, and they said they come to kill a nigger.
Q. Who said that?
A. Phillip Hanson.
Q. Which side of the fence were they on?
A. They were in the yard.
Q. There at your father's house?
A. Yes, sir.
Q. What did they have with them?
A. They had sticks.
Q. All three of them had sticks?
A. Yes, sir.
Q. When they said they had come to kill a nigger what did they do?
A. They didn't do anything; Alex walked on out towards them, and they talked there a little bit, and Phillip Hanson hit Alex over the head with a stick.
Q. What else happened?
A. And then Alex hit him back, and George Erne——

163 Q. What did Alex. hit him with?

A. His fist. And George Erne hit Alex. across the arm with his stick.

Q. Go ahead and tell us all about it.

A. And Phillip Hanson and Alex. went to wrestling, and Phillip threw Alex. and commenced to beating him; and George Erne every once in a while would hit him with a stick.

Q. Were they still standing up?

A. No, sir; Alex. was laying under Phillip Hanson.

Q. Go ahead and tell us all about it.

A. Phillip was beating Alex., and Alex. raised up and kind of got his pistol and shot him.

Q. Where was Alex.'s pistol when he went on out there towards them?

A. It was in his pocket.

Q. He didn't have it in his hand?

A. No, sir.

Q. Then he got his pistol and shot him. How was Alex. standing then?

A. He was laying down.

Q. Laying down when he shot him?

A. Yes, sir; Phillip Hanson was beating him.

Q. What were the other two boys doing?

A. George Erne kept hitting him with his stick; Willie didn't do anything.

Q. What size sticks did they have?

A. Pretty bigs ticks.

Q. About how big?

A. About as big as your two fingers; pretty near that big.

Q. How many times did Alex. shoot?

A. Three times.

Q. You say while he was lying down he shot Phillip Hanson?

A. Yes, sir.

Q. How was it when he shot the second time?

A. After he shot Phillip Hanson George Erne hit him another lick or two; and George started to run and he shot him—shot at him twice.

164 Q. What did he do to the little boy, Willie?

A. He didn't do anything to him.

Q. What did he say to him, if anything?

A. No; he didn't say anything.

Q. After he shot Phillip Hanson, what did Phillip do?

A. Phillip jumped off of him and started to run.

Q. How far did he go?

A. About 40 steps from him, I think.

Q. Did he stay on the same side of the fence?

A. No, sir; he jumped over the fence.

Q. Did he jump over the fence?

A. Yes, sir.

Q. What kind of a fence was it?

A. Six wires.

Q. Did he get over the top wire, or go through it?

A. He went through it.

Q. How far did he go; did he still keep going?
A. Yes, sir.
Q. How far?
A. About 15 more steps on the other side of the fence, in the wheat field.
Q. Harvey, are you sure they got over on the inside, these boys?
A. Yes, sir.
Q. They got over on the inside, all of them?
A. Yes, sir.
Q. What did you do?
A. I didn't do anything.
Q. What did you say?
A. I didn't say anything.
Q. Did Aleck have a scabbard with his pistol?
A. Yes, sir.
Q. What did he do with his scabbard?
A. I don't know.
Q. I will ask you if he gave the scabbard to you to hold while he was shooting?
A. No, sir.
Q. He didn't?
A. No, sir.
Q. Had you ever seen the pistol before?
A. Yes, sir.
Q. Didn't you know that he had the pistol in his pocket?
165 A. No, sir.
Q. Do you know where he got the pistol?
A. No, sir; I seen him when he got it out of his pocket.
Q. I mean, did you see him when he put it in his pocket?
A. No, sir; I didn't see him do that.
Q. How far from your home was it down there in the Territory that you met Alex?
A. It was pretty nearly to town.
Q. After you went back down there, did you go in the house?
A. Yes, sir.
Q. Did Alex go in the house?
A. Yes, sir.
Q. Do you know where he usually kept his pistol?
A. No, sir.
Q. You don't know about that?
A. No, sir.
Q. You don't know whether he had the pistol when you met him or not, do you?
A. No, sir.
Q. When did you say was the first time you saw the pistol that morning, the day of the shooting?
A. I didn't see it until he shot him.
Q. Have you told it the way it occurred? Is the way you have told us the way it occurred?
A. Yes, sir.
Q. How old are you?

A. 12 years old.
Q. What was it they said when they first came up there?
A. Alex said "Hello," and they said "Hello, God damn you."
Q. What did Alex say then?
A. Alex went and walked on out there towards them, and Alex asked them what they wanted, and they said they had come to kill a nigger.
Q. Had Alex gone out towards where they were until they got over inside of the yard?
A. No, sir. It was about 15 st'ps from the house where they were fighting inside of the yard.

166 Cross-examination:

The DISTRICT ATTORNEY. Your name is Harvey, is it?
A. Yes, sir.
Q. You have told this just as it occurred?
A. Yes, sir.
Q. I understand you, when you first saw them, these boys, together coming, you and Alex were together, you had come out of the spring house——
A. Out of the house.
Q. You had come out of the house; what house is that?
A. That is my pa's house on the farm.
Q. What were you doing in the house?
A. We went in there to skim the milk.
Q. Was it a spring house?
A. No, sir; it was a little box house.
Q. Not the house you lived in?
A. No, sir; my grandpa staid down there al' the time.
Q. Was it the house your grandpa lived in you came out of?
A. Yes, sir.
Q. When you came out of the house you saw these boys for the first time, did you, crawling over the fence?
A. Yes, sir.
Q. Had Alex seen them before you did?
A. No, sir.
Q. You both came out of the house together and saw them there?
A. Yes, sir.
Q. You are sure of that?
A. Yes, sir.
Q. Alex didn't come out of the house and then go back and tell you they were come, and not to lock up the house?
A. No, sir; we were both out there with the churn.
Q. And you both saw them crawling through the fence?
A. Yes, sir.

167 Q. When they got through the fence Alex asked them what they were coming for?
A. No, sir; he said "Hello."
Q. Then they said they were going to kill a nigger?
A. No, sir; they said, "Hello, God damn you." Alex went out towards them and then they said that.
Q. Alex didn't say, "You have come to have that battle, have you?"
A. No, sir.

Q. And they say, "Yes; we have come to have the battle?"
A. No, sir.
Q. But they said, "We have come to kill a nigger," and then Phillip hit Alex over the head with a stick?
A. Yes, sir.
Q. Didn't hit him over the arm, but over the head?
A. No, sir; George Erne hit him over the arm.
Q. And got him down?
A. Yes, sir.
Q. He didn't get Phillip down, did he?
A. No, sir.
Q. You are sure of that, and then George Erne come and helped him and the two put him down?
A. No, sir.
Q. He had his pistol out at the time, did he?
A. Yes, sir.
Q. He had his pistol at first?
A. Yes, sir.
Q. He didn't jump up and get away from him and go to the house and get his pistol and come back?
A. No, sir.
Q. You are sure of that?
A. Yes, sir.
Q. When he shot Phillip he shot him while he was down, did he?
A. Yes, sir.
Q. Phillip was on top of him?
A. Yes, sir.
Q. He only shot Phillip once?
A. Yes, sir; he shot three times but, shot him once.
Q. You are certain about that, are you?
A. Yes, sir.
168 Q. Didn't he go into the house after Phillip and George had him down; didn't he go into the house and get his pistol and come out, and when he got pretty close to Phillip shoot him?
A. No, sir.
Q. You say he didn't say anything to the little boy?
A. No, sir.
Q. After he shot twice at George didn't he tell him to get away from there, God damn him?
A. No, sir.
Q. You know Mr. N. M. Clifford, don't you?
A. Yes, sir.
Q. On the 20th day of last May, about a week or so after this killing, you were in Mr. Clifford's office, were you not?
A. Yes, sir.
Q. You made a statement to him that he wrote down, didn't you?
A. Yes, sir.
Q. You signed it, didn't you?
A. Yes, sir.
Q. You write your name, don't you?
A. Yes, sir.

Q. That is it, is it not [handing witness a paper]?
A. Yes, sir.
Q. You wrote that, didn't you?
A. Yes, sir.
Q. That was in Mr. Clifford's office, wasn't it?
A. Yes, sir.
Q. In Coffeyville?
A. Yes, sir.
Q. Now, let's see if you made this statement to Mr. Clifford: "My name is Harvey Marks." You stated that?
A. Yes, sir.
Q. "I am 11 years old?"
A. Yes, sir; I was 11 years old then.
Q. "On last Saturday my pa sent me to the farm after the cream; we kept our milk cows down at the farm?"
A. Yes, sir.
Q. "I went in a cart, driving one horse?"
A. Yes, sir.
Q. "I went alone, and in going down I met grandpa, brother Jimmie, and Alex coming to town;" that is right?
A. Yes, sir.
169 Q. You told Mr. Clifford that?
A. Yes, sir; I met three of them.
Q. "Alex got out and went back with to show me what milk to skim;" that was right, wasn't it?
A. Yes, sir.
Q. "We got to the house and we skimmed the milk;" is that right?
A. Yes, sir.
Q. "After we got there Alex went to the barn while I was locking the house up;" did you tell him that?
A. He didn't go to the barn.
Q. Did you tell Mr. Clifford that?
A. I don't know whether I did or not.
Q. "While I was locking the house up Alex saw the boys coming, and he came back and told me not to lock the house; these Erne boys were coming and the Hanson boy was with him;" did you tell him that—that Alex went out of the house to the barn?
A. We didn't see the boys——
Q. Did you tell Mr. Clifford that Alex went out and saw the boys coming, and came back and told you not to lock up the house, for the boys were coming?
A. I can't remember.
Q. That is before you saw the boys; did he tell you they were coming there to whip him? "I staid at the house;" did you say that?
A. No, sir.
Q. "And he," that is, Alex, "was in the yard;" did you say that?
A. No, sir; I don't think I did.
Q. "He staid in the yeard until the boys crawled through the fence;" did you tell him that?
A. I can't remember.

Q. You now say the first you saw of them they crawled through the fence?

A. Yes, sir; that is the first I saw of them.

"Between the stable and chicken house;" that is where they crawled through?

A. Yes, sir; they crawled through right there.

170 Q. "Alex said, "You come over here to have that battle, did you;" did Alex say that?

A. No, sir.

Q. You didn't tell Clifford that?

A. No, sir.

Q. "Phillip said, 'God damn you, and we ain't going back without it, either?'"

A. No, sir; he didn't say that.

Q. "Hanson's boy then commenced to whip Alex;" is that right?

A. Yes, sir.

Q. "With a stick over the arm?"

A. No, sir; he didn't hit him over the arm; he hit him on the head first.

Q. "Alex got the Hanson boy down;" did you tell him that?

A. No, sir.

Q. "And George Erne run up and commenced to whip Alex." After Alex had the Hanson boy down then George came up and started to whip Alex; did you tell him that?

A. No, sir; I don't think I did.

Q. "Alex then got loose from them and run in the house and got his pistol." Did you tell him that?

A. No, sir.

Q. "And run out in the yeard, where they were?"

A. No, sir.

Q. "And when he got pretty close to them"—that is, after he had the Hanson boy down and he got loose from them and went in the house and got his pistol and came out in the yard—"when he got pretty close to them he shot Phillip Hanson;" did you tell Mr. Clifford that?

A. I can't remember.

Q. You certainly did not tell him that, because you now say that he shot him while he was on the broad of his back, and that he didn't go into the house for the pistol at all.

A. He didn't go in the house for the pistol.

Q. Then what I have read you is not true, and you didn't tell

171 Mr. Clifford that?

A. No, sir.

Q. "And then the Hanson boy started to run, and George Erne did to'; then Alex shot at George Erne two times; then the little Erne boy started off, but did not run." Is that right? "Then Alex pointed his pistol at the little Erne boy and said, 'you run, God damn you.'" Did you tell Mr. Clifford that?

A. No, sir.

Q. "Then the little Erne boy said, 'No, I am not going to do anything at all." He said this while he was walking off."

A. Willie Erne didn't run.

Q. Did you tell Mr. Clifford that Alex pointed his pistol at him and told him to run, God damn him?

A. I didn't hear him say that.

Q. You didn't tell Mr. Clifford that?

A. No, sir.

Q. When did you put your cream and churn in the cart, before or after the shooting?

A. After the shooting.

Q. Then you went to town, did you?

A. Yes, sir.

Q. Where did the defendant leave you?

A. Up there by the depot.

Q. When you came to the railroad did he get off there?

A. Yes, sir.

Q. As soon as you got to the railroad crossing he got off there?

A. Yes, sir.

Q. Bid you good-bye?

A. Yes, sir.

Q. How many cartridges did he say that he had?

A. He didn't say that he had any—he said he didn't have any more after he shot off three.

Q. I will ask you if he didn't tell you that he had five cartridges in his pistol, and if you didn't tell Mr. Clifford so?

172 A. No, sir; he told me he only had three cartridges; only shot three times.

Q. I will ask you if you didn't tell Mr. Clifford on that occasion that he had five cartridges in his pistol, that he told you that, but you didn't know how many yourself there was?

A. No, sir; I didn't.

Q. Did he tell you anything about the trouble he had on the Wednesday or Thursday before?

A. Yes, sir; he told me that—that the boys were mad at him.

Q. Did he tell you about having some trouble before?

A. No, sir; he just said these Erne boys were going to whip him; that is all he told me. He didn't say anything about Phillip Hanson, either.

Q. Did he shoot any on the road to town?

A. No, sir.

Q. You say now that he had his pistol all the time?

A. Yes, sir.

Q. You didn't tell Mr. Clifford that he went back in the house and got his pistol?

A. No, sir.

Q. You admit making the statement to Mr. Clifford, and that he wrote it down?

A. Yes, sir.

Q. After this thing occurred you and he went to the house and got a valise, didn't you; a grip? After this shooting occurred you went to the house and got a grip?

A. He got a grip; I didn't. He had a grip there.

Q. What did he get the grip for?

A. He said he was going to Oswego.

Q. What for?

A. I don't know.

Q. He didn't intend to go to Oswego until after he shot this boy, did he?

A. No, sir; he didn't tell me nothing about whether he was going or not.

173 Q. He didn't take the grip with him when he started down with your pa, did he?

A. No, sir.

Q. It wasn't until after the shooting occurred that he got his grip to run off; you drove pretty fast?

A. Yes, sir.

Q. Who drove, you or he?

A. Him.

Q. You let the horse go as fast as it could go?

A. Yes, sir.

Q. Run?

A. No, sir; it didn't run; just trotted him and loped him a little.

Q. Went as quick as you could go?

A. Yes, sir.

Q. When he got to the railroad he jumped off and bid you good bye and took his grip with him?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Did he show you how many loads were left in his pistol?

A. Yes, sir.

Q. Did he say that he only had three loads in his pistol?

A. Yes, sir; he told me that he only shot three times; that he had three loads.

Q. How come him to tell you that; did he tell you that he would have shot three more times if there was more loads in it?

A. No, sir.

Q. How come him to tell you that; you were in Mr. Clifford's office, you say?

A. Yes, sir.

Q. Did you tell Mr. Clifford the truth?

A. Yes, sir.

Q. Did you tell him the truth upon that occasion or were you trying to deceive him?

A. I told him as near the truth as I could.

Q. You did?

A. Yes, sir.

Q. Do you say to me that you didn't tell him that this boy went
174 to the house and got his pistol and came out there, and when he got pretty close to Hanson fired on him; did you tell him that?

A. That he had the pistol in his pocket?

Q. I am asking you what you told Mr. Clifford now. You say you signed this paper here just as I read it to you, and I have read it just as it is, and I wouldn't read it different, not for the world; I have read it to you just as it is written down; didn't you make that statement to Mr. Clifford? Just own up to it if you did.

A. Yes, sir; I made a statement.

Q. Didn't you tell him what I have read to you here, tell him when you went down there you went to the house and while you were there that Alex went out to the barn, and saw these boys coming, and that he told you not to lock up the house they were coming, and you went out to them and he asked them if they were come to have that battle and they told him yes, and they got into this fight, and then Alex got away from them and went in the house and got his pistol and came out and shot Hanson when he got very near to him and shot George while he was running away from him; didn't you tell him that? Just own up to it if you did.

A. I don't know; I guess I did.

Q. What did you tell him that for; why did you tell him that? I guess you did too, my son. I should think you did. It is written down here just that way. Why did you tell him it was that way if it was not true, and why do you say different now; you see you put it very different now.

A. I am telling it here just like it was.

Q. Did you tell Mr. Clifford like it was?

A. No, sir; I didn't tell him like it was.

Q. Why didn't you tell him the way it was?

A. I don't know.

175 Q. Why didn't you tell him like it was, and why didn't you tell him the truth?

A. I don't know.

Q. Did somebody tell you not to tell the truth about it?

A. No, sir.

Q. It was right f'esh, then; it was only the Saturday before this that thing occurred?

A. Yes, sir.

Q. Did you tell him a story?

A. I told him like it is on the paper, I guess.

Q. You say you didn't tell him the truth?

A. No; I am telling it here just like it was.

Q. I know you are here; I don't doubt that at all; but I am not asking you what you say here; I am asking you what you told Mr. Clifford, and want to know if you told Mr. Clifford the truth.

A. If I didn't tell him like I do here I didn't.

Q. Well, you know whether you told him the truth or not. If you told it the way he has got it written here it is not anything like the way you tell it now.

A. I am telling it here like it was.

Q. Did you tell Mr. Clifford the truth about it?

A. No, sir; I didn't tell him exactly the way it was.

Q. Why didn't you? Did you think Mr. Clifford wanted what wasn't true? Did you tell Mr. Clifford the truth when you told him that George, after having the fight—that Alex, I should say—had gone to the house and got his pistol, and that he came back from the house with his pistol in his hand and that he got pretty close to Phillip and shot him; did you tell him the truth then?

A. No, sir.

Q. Why didn't you tell him the truth?

A. If I told him that, I say I didn't.
176 Q. How did you tell him that was?
A. I don't know.
Q. You know whether you tried to tell the truth or not; did you try to?
A. Yes, sir; I tried to.
Q. Don't you think you could tell the truth if you were to try to?
A. Yes, sir.
Q. You tried to tell Mr. Clifford the truth, did you?
A. Yes, sir.
Q. Then why do you say you didn't tell him the truth?
A. I don't know, sir.
Q. Do you know what you are talking about?
A. Yes, sir.
Q. Are you telling this now as you saw it, or did somebody tell you to tell it as you tell it now?
A. No, sir; I am telling it like I saw it.
Q. Why did you tell it right after the shooting one way and now another way?
A. I am telling it here just like it was.
Q. You were telling Mr. Clifford just like it was, were you not?
A. No, sir.
Q. How do you know you were not?
A. Because.
Q. Tell me why you didn't tell him the truth?
A. I don't know.
Q. Tell me why you didn't tell him the truth; there must be some reason for it. Why didn't you tell Mr. Clifford the truth about it?
A. I don't know.
Q. Did he abuse you?
A. No, sir.
Q. Did he scare you?
A. Not very bad.
Q. Did he treat you kindly?
A. Yes, sir.
Q. He told you that he didn't want you to tell the truth about it, did he?
A. No, sir.
Q. What did he tell you?
177 A. He told me to tell him something about it.
Q. You saw him write it down, didn't you?
A. Yes, sir.
Q. You knew what he was writing; that he was writing down what you said; he read it over to you, did he not?
A. Yes, sir.
Q. He read it over to you after he wrote it?
A. Yes, sir.
Q. You signed it?
A. Yes, sir.
Q. Can you read and write?
A. Yes, sir; a little.

Q. And Mr. Clifford read it over to you and you signed it?

A. Yes, sir.

Q. Did you tell the truth?

A. No, sir; I didn't.

Q. Where was your father and mother at that time; at the time you were at Coffeyville and made this statement to Mr. Clifford?

A. My father was up in town some place, and my mother was up home.

Q. You say you didn't tell Mr. Clifford the truth about it; did your father tell you not to tell the truth?

A. No, sir.

Q. Did Mr. Morgan tell you not to tell the truth?

A. No, sir; I hadn't seen Mr. Morgan.

Q. Did anybody tell you not to tell the truth?

A. No, sir.

Q. You did it just on your own motion?

A. Yes, sir.

Q. You just told a lie to Mr. Clifford because you wanted to?

A. I don't know.

Q. I want to know why it was that you told Mr. Clifford a story about it; that is all, my son. You see, here is the way it is: You are a little fellow, and I don't want to press you too much. You are a little boy here on the stand, and little boys sometimes tell stories. I know how that is myself, because I was a boy once myself.

178 Mr. FREDERICK (counsel for defendant). You didn't tell any stories, though?

The DISTRICT ATTORNEY. I don't know. It would not do to press me too much. But I never told a story unless I had some motive, some reason. (To the witness:) You are under oath now, and of course it don't make much difference for a little boy to tell a story when he is not under oath, yet he ought to tell the truth when he is under oath. Why did you tell a story?

A. I didn't think he wanted to know exactly how it was.

Q. So you thought you would tell him different; why did you think that he didn't want to know how it was?

A. He didn't act like it.

Q. Because he took you in and told you to tell the truth about it?

A. He didn't tell me to tell the truth about it.

Q. You thought he didn't want to know the truth, and you told him a story?

A. Yes, sir.

Q. Do you tell stories pretty often that way?

A. No, sir.

Q. Who was in the room besides you and Mr. Clifford?

A. My brother.

Q. Your brother George; anybody else?

A. There was a girl, and two more; I don't know who they were.

Q. And before all of these people you sat there and told a story about it, and had it put down on the paper, and had Mr. Clifford read it to you, and then took the pen in you hand and signed that story about the killing of a boy, did you?

A. He told me to write my name down there.
Q. He read it to you first?
A. Yes, sir.
Q. Do you now admit that that was a story you told Mr. Clifford?
A. Yes, sir.

179 Redirect examination by Mr. FREDERICK:

Mr. Clifford called you in and asked you to tell how it was, did he?
A. Yes, sir.
Q. Did you undertake to tell how it was?
A. Yes, sir.
Q. When you answered the district attorney about telling a story, did you mean that this is not written down right, or did you not tell him right?
A. I didn't tell him right.
Q. Did you purposely not tell him right?
A. No, sir.
Q. You didn't purposely not tell him right?
A. No, sir.
Q. What I mean by that is, did you tell him wrong purposely?
A. No, sir.
Q. You didn't purposely tell him wrong?
A. No, sir.
Q. Did he read it over to you after he had written it down?
A. Yes, sir.
Q. And then he told you to sign it?
A. Yes, sir.
Q. Did you tell him there was something in it not right?
A. He didn't ask me.
Q. He didn't ask you whether it was right or not; he just read it over to you and told you to sign it?
A. Yes, sir.
Q. Then you didn't tell him wrong in order to deceive him, then?
A. No, sir.
The DISTRICT ATTORNEY. I suppose you forgot?
A. Yes, sir.
Mr. FREDERICK (counsel for defendant). I suppose you didn't forget, had you?
A. Yes, sir.
The DISTRICT ATTORNEY. I got him first.

180 Mr. FREDERICK (counsel for defendant). You didn't tell him for the purpose of deceiving. Do you know, or did you know, why he wanted you to tell him?
A. No, sir.
Q. Was he an officer of the court or anything of that kind?
A. Yes, sir; he was an officer; he was a marshal.
Q. Did you think it was your duty to tell him how it was?
A. No, sir.
Q. You didn't think it was your duty to tell him?
A. No, sir.

Q. Did you go to Independence?
A. Yes, sir.
Q. As a witness?
A. Yes, sir.
Q. Did you swear there about how it was?
A. No, sir.
Q. They didn't call on you to tell how it was there?
A. No, sir.
Q. You didn't tell the commissioner there how it was?
A. No, sir.
Q. He didn't ask you?
A. No, sir.
Q. Did he ask your brother?
A. No, sir.
Q. Do you remember how the thing occurred there that day, the shooting?
A. Yes, sir; I do now.
Q. You remember it?
A. Yes, sir.
Q. Are you telling the jury here the truth about this; how it occurred?
A. Yes, sir.
Q. You are telling the truth about it?
A. Yes, sir.
Q. No one has talked to you about it except Mr. Clifford?
A. No, sir.
Q. Mr. Clifford talked to you about it?
A. Yes, sir.
Q. Did Mr. Clifford talk to you about it before he wrote it down?
A. No, sir.
Q. Did he ask you any questions except what he writes down here?
A. No, sir.
181 Q. Have you talked with anybody since you have been here about it?
A. No, sir.
Q. You talked to me yesterday morning out here, didn't you?
A. Yes, sir; I talked with you; that is all.
Q. It was a very short talk at that?
A. Yes, sir.
Q. Have you ever seen Alex since then, since the shooting?
A. I saw him yesterday setting in here.
Q. Have you ever spoken to him since—since he left you at Coffeyville?
A. I spoke to him to-day when he got out there in the wagon.
Q. You have never had any conversation nor talk with him?
A. No, sir; I just said "hello."
Q. Have you had any conversation with any of his kin folks?
A. No, sir.
Q. Have you seen any of them?
A. I have seen his father.
Q. Where did you see his father?
A. At Independence.
Q. Have you seen his father since then?

A. No, sir.
Q. Are you any kin to Alex?
A. No, sir.
Q. Were you acquainted with him before he came to your father's to work?
A. No, sir.
Q. Had you ever seen him before?
A. No, sir.
Q. You are 12 years old now?
A. Yes, sir.
Q. Have you been to school at home?
A. Yes, sir; when I am there.
Q. You can read and write, can you?
A. Not good.
Q. You can write?
A. A little.
Q. Did you ever try to read this (referring to paper from which the district attorney refreshed his memory to ask witness questions relating to conversation with N. M. Clifford).
A. No, sir.
Witness excused.

182 WILLIAM MARKS, having been duly sworn upon behalf of the defense, was examined by Mr. C. J. Frederick, and testified as follows, to wit:
Question. What is your name?
Answer. William Marks.
Q. Where do you live?
A. I live in Coffeyville, Kansas.
Q. Do you sometimes stay on a farm down there three or four miles?
A. Yes, sir; sometimes down there.
Q. Were you staying on the farm last May?
A. Yes, sir; I was down there.
Q. Who assisted in conducting the labor on the farm?
A. I was there at the time, and my son would come backward and forward.
Q. What labor or help did you have?
A. I didn't have any help but that biggest boy, and that one there.
Q. This defendant?
A. Yes, sir.
Q. You had him hired?
A. Yes, sir; he had been there about three weeks.
Q. About three weeks when this killing occurred?
A. Yes, sir.
Q. How far is the house on the farm from Mr. Erne's?
A. About half a mile from Mr. Erne's.
Q. What direction is it from Mr. Erne's?
A. It is sort of west, mighty nigh due west.
Q. You mean Erne's is from you west?
A. Yes, sir.
Q. About half a mile?

A. Yes, sir.
Q. Do you know where that lake is up there?
A. Yes, sir.
Q. What direction is that from your place?
183 A. Right east from my place.
Q. What direction is it from Erne's?
A. It is east from Erne's.
Q. It could not be due east from both places?
A. Yes, sir; I stays right east of Mr. Erne's, and the place is right straight down from my place.
Q. In going from Erne's to the lake you would have to go by your place?
A. No, sir; they are not obliged to go by my house.
Q. Is there any road from Erne's to the lake?
A. Yes, sir; by going up a lane I guess you can go down that way [witness shows on diagram how a party may go from Erne's to the lake].
Q. On this Saturday, the 14th of last May, when this boy was killed—I believe you say that was the day—what were you doing?
A. I was there at home.
Q. Down on the farm?
A. Yes, sir; I wasn't at home when he was killed.
Q. That morning of the day of the killing?
A. Me and that same one, Alex there, went on *ip* to town on Saturday morning; went on up to town in a wagon and met this little boy of mine——
Q. That is, little Harvey?
A. Yes, sir.
Q. He is your grandson?
A. Yes, sir. I met him right down this side of town and me and Alex were in a wagon.
The DISTRICT ATTORNEY. You met Harvey?
A. Yes, sir. We were going up to town with some hay and I told Alex, "You go down and go back with Harvey"——
Mr. FREDERICK (counsel for defendant). How was Harvey travelling?
A. He was driving a mare in a cart or buggy, and so I said to Alex to go back with Harvey to get the milk.
184 Q. Where was Harvey going?
A. He was going down on the farm.
Q. What for?
A. After the cream.
Q. Driving a cart or buggy; which was it?
A. Put a churn in the bottom of the cart——
Q. And he had a churn in there with him?
A. No, sir; the churn was down at home.
Q. Then you told Alex to get in the cart and go on down with Harvey?
A. Yes, sir.
Q. Alex did that?
A. Yes, sir.
Q. You don't know anything more that occurred between them until after the boy was killed? You went on up in town?

A. Yes, sir; I went on up to town; I never knowed anything about it at all until the little boy came on.

Q. Was it in the afternoon you learned about it?

A. I don't recollect whether it was afternoon or not, but it was along about 11 o'clock, I think it was.

Q. What time of day was it you met Harvey?

A. About 10 o'clock when I met Harvey.

Q. How far was Harvey from home, down on the farm?

A. He was about 2 miles from the farm.

Q. Harvey and Alex would have to go about two miles to get back home to where the milk was?

A. Yes, sir.

Q. How long had you known this boy?

A. I had just been knowing him about three weeks, was all the acquaintance I had with him; he came there and said he wanted to get some work somewhere. His father was going to Oklahoma and he wanted somewhere to work, and so my son told him that he didn't have
185 anything for him to do, no money to pay him, and if he was a mind to come there and work with the boys he would pay him his board, would board him, and he said he would.

Q. That is the way he was working, for his board?

A. Yes, sir; and having his washing done.

Q. How long had he been at work there?

A. About three weeks.

Q. Under whose direction?

A. Under my son's direction.

Q. In your son's absence was he under your charge?

A. Yes, sir.

Q. He worked during the three weeks?

A. Yes, sir; he was a very smart boy to work, and a very nice boy. I never had any words with him. He was with my boys, and I never knew him to have any fuss at all.

Q. You speak of your boys; you mean your grandsons?

A. Yes, sir.

Q. He behaved himself, then, did he?

A. Yes, sir.

Q. Did you know about his having a pistol?

A. I never knew he had a pistol—I knew he had a pistol, but I didn't know that he had it there. He was trying to sell this pistol, you know.

Q. You knew that he had one?

A. Yes, sir; but he had it up in town.

Q. Do you know whether it was down on the farm at all?

A. No, sir; I don't; and he had it in town, and my son's wife had the pistol there up at home, you know, and, I suppose, he got his satchel away from there, and then he got the pistol in the satchel.

Q. Where was his satchel; was it down on the farm?

A. He fetched it from up to Coffeyville down on the farm.

Q. It was down on the farm on Saturday?

A. Yes, sir.

Q. How long had it been down on the farm?

A. He fetched it there that same week, on the Saturday before that.

186 Q. Had you seen him with the pistol down on the farm?

A. No, sir; I never saw him with the pistol down there at all. He was trying to sell the pistol to my son, and my son told him that he never had any use for a pistol at all, and he was offering to sell the pistol to a white fellow in town, and he asked fifteen dollars for the pistol.

Q. Did you say anything to him about the pistol, about having it, or using it?

A. He never used it at our house that I saw him. I didn't know it was there.

Q. You never said anything to him about the pistol at all?

A. No, sir; I never said anything to him about the pistol at all.

Q. Did you know that he had any trouble with these Erne boys; or this Phillip Hanson?

A. He never had any trouble with them because he didn't know them. He didn't know them until he went do'n after these horses in the lane, and I told him—I told Alex, "You and Jimmie go yonder and head those horses and drive them back."

Q. You had told him to go and get the horses and drive them back?

A. Yes, sir; I told him to go and get them and drive them back, and Alex and this Jimmie went on down after the horses, and the water was up and I suppose it was out there these boys——

Q. You do not need to tell what you heard. Had you heard there was any ill feeling between them?

A. No, sir; there wasn't nothing between them up to the time they went after the horses.

Q. Did you hear, at any time, the Erne boy, or the Hanson boy, say anything to him?

A. No, sir; they never said anything to him, sir.

Q. You never heard them say anything to him, or you never heard them say anything about it?

A. No, sir; I didn't know there was any fracas betwixt them at
187 all until the little boy told me that Alex had killed Hanson.

Q. Up to the time of the killing you never heard of any trouble?

A. No, sir; I didn't know there was anything betwixt them at all.

Q. Did you know this Hanson boy?

A. I saw him one time. That is the time when he came around our field there looking for his horses.

Q. You only had seen him once?

A. I had just seen him one time; is the only time I had ever seen him.

Q. What size boy was he?

A. He was a young man; he was good size. He was a big boy, large fellow; what you would call about a 18-year-old boy.

Q. Did you know this defendant's father?

A. No, sir; I never knew anything about him; I never saw him in my life that I know of.

Q. He is no kin to you, is he?

A. No, sir; he is no kin at all.

Q. I haven't talked with you very extensively with you; I will ask you if there is anything else about this case you know anything about?

A. No, sir; there is nothing else I know anything about.

Cross-examination by the DISTRICT ATTORNEY:

Are you the father of these two boys who are here?

A. No, sir; my son is the father of them. I am their grandfather.

Q. Your son is named Albert, is it not?

A. Yes, sir.

Q. Did he live on the farm?

A. Yes, sir; he is on the farm running it, but he stays backward and forward about town and I stays down at the farm.

188 Q. Was he on the farm on the day of the killing?

A. No, sir; he was in town.

Q. You are the grandfather of these two boys?

A. Yes, sir.

Q. You don't know anything about this killing?

A. No, sir; I don't know a word about it.

Q. You are the man that started from the house to Coffeyville with Harvey Marks?

A. No, sir; I started from——

Q. I mean with the defendant here?

A. Yes, sir.

Q. And you met Harvey?

A. Yes, sir; I met Harvey.

Q. Where was the older one—what is his name?

A. Jim.

Q. Where was he?

A. In town.

Q. Didn't come with you up that day?

A. He was in town.

Q. Jimmie wasn't riding with you and this boy?

A. No, sir.

Q. Are you certain of that?

A. Yes, sir.

Q. Nobody but you and this boy in the wagon going up?

A. Me and that boy was in the wagon.

Q. When you met Harvey?

A. Yes, sir.

Q. Jimmie was not in the wagon?

A. No, sir; I don't recollect it. He wasn't in the wagon, because me and that boy was going up to town.

Q Think about that.

A. I don't think he was; no, sir; he wasn't in the wagon, because when this news came out about the boy was killed me and Jimmie got into the buggy and went back down home. If he was I have missed my recollection.

Q. Didn't you tell this defendant when you and he started to town that morning that he must leave his pistol at home, not to take it with him?

A. No, sir.

Q. You are quite certain of this?

A. Yes, sir; I am as certain as sure as I live.

189 Q. Didn't you tell him in the presence of Jimmie or Harvey that you didn't allow him to carry that pistol, and that he must leave it at home?

A. No, sir; I never did tell him that.
Q. You didn't even know he had it there?
A. I know he had the pistol——
Q. You didn't even know that he had it at the farm?
A. I know he had had the pistol there, and Betty, she had taken the pistol——
Q. You knew that he had it in Coffeyville?
A. Yes, sir; I knew that he had it in Coffeyville.
Q. That will do about that, then. He claimed to come from Oswego, didn't he?
A. Yes, sir; somewhere about Oswego.
Q. He was a stranger to you when you met him?
A. Yes, sir.
Q. When you hired him you had never known him before?
A. No, sir; I didn't hire him; my son hired him.
Q. You didn't know his father or his folks at all?
A. No, sir; I didn't know anything about him.
Q. Did you know what he was doing away down in the southern part of Kansas?
A. He said his father was going to Oklohoma, was going to sell out, and his father told him he could go and go to Coffeyville and stay there until he come, to work around somewhere.
Q. That is what he told you?
A. Yes, sir.
Q. Did he bring his pistol with him when he came?
A. I suppose he did, sir.
Q. This pistol I now hand you is the pistol, is it not [handing witness pistol heretofore introduced in evidence]?
A. Yes, sir.
Q. That looks like the pistol, does it not?
A. Yes, sir; I never did have my hands on it in my life.
190 Q. You think your little boy came to you about 11 o'clock and told you about the shooting, did he?
A. I can't tell exactly what time of day it was, because I didn't think about it, but the little boy came to me; I was down at his mother's house, and he came in a hurry to me, you know, and he said, "Grandpa——"
Q. He told you about it; never mind what he said. He told you about Phillip being killed?
A. Yes, sir; he said Alex had killed the boy.
Q. Did he tell you who he had killed?
A. He said Phillip.
Q. He told you that he had killed him, did he?
A. Yes, sir.
Q. That was Harvey told you that?
A. Yes, sir.
Q. You knew, then, that the Hanson boy was killed because this little boy knew that Hanson boy was killed—knew that he was dead in Coffeyville about 11 o'clock, you think?
A. Yes, sir.
Q. Did he say anything about as to whether he shot the other boy or not?

A. He told me that he had shot at the other boy twice, I think he said.
Q. That is the first you had learned of it?
A. Yes, sir.
Q. Were you present in Mr. Clifford's office when these boys made their statements to him, your two grandsons?
A. No, sir.
Q. You made no statement to Mr. Clifford yourself?
A. No, sir.
Q. Albert is the father of these boys, is he not?
A. Yes, sir; I didn't see Alex until yesterday since he done the shooting, you know.
Q. Wher' was you raised?
A. I was raised in Alabama.
Q. You were a slave there, I suppose?
Yes, sir.
Q. You went up to Kansas after the war?
A. Yes, sir.
Q. You don't know anything about the killing; you didn't hear of any trouble or any disturbance?
191 A. No, sir; I didn't hear a thing about it at all——
Q. Were you there all day Friday?
A. Yes, sir.
Q. Were you there Thursday?
A. Yes, sir.
Q. Did you know of there having any trouble there Thursday?
A. They didn't have a bit; not a thing.
Q. When you sent them after the horses did they have any trouble that day?
A. It is not to my knowing; only just what they said.
Q. What did they say to you about it?
A. They said when they came back—Alex said them three boys they tried to not let us have the horses; they commenced rocking us, and I said, "What for?" and he said, "Because they tried to make us go across the water, and we wouldn't go across there; and we went up by those straw stacks and went across, and then that Hanson boy commenced chunking me with chunks, and I got on the horse and run off from him."
That is all the trouble you ever heard of?
A. Yes, sir.
Q. They claimed that the Hanson boys chunked them?
A. Yes, sir.
Q. Who was it told you about it; was it this defendant?
A. Yes, sir.
Q. When he was going after the horses, he told you when he came back that the Hanson boy had chunked him because he wanted him to go across there and he wouldn't do it?
A. He wanted to make the boys go across the water there and the water was up, and, of course, Alex could swim, but Jimmie could not swim; and so they went up where they could get across.
Q. They, then, did have some trouble on Thursday; if they chunked hem that was some trouble?
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A. That was all the trouble, I suppose, there was. That wasn't much; only they just chunked them.

Q. You hardly think that was enough to kill a boy for?

A. No, sir.

Q. That is your idea about that?

A. Yes, sir.

Witness excused.

192 ALBERT MARKS, having been duly sworn upon behalf of the defendant, was examined by Mr. C. J. Frederick, and testified as follows, to wit:

Question. What is your name?

Albert; Albert Marks.

Q. Where do you live?

A. Coffeyville, Kansas.

Q. Do you know this defendant?

A. Yes, sir.

Q. Where did you know him?

A. In Coffeyville, the first I seen him.

Q. How long ago; when?

A. It was 'long about last April—about the last of last April I seen him first.

Q. What was he doing?

A. He had his grip in his hand travelling; he said he had started to Oklahoma.

Q. I will ask you if he was in your employ—if you employed him?

A. No, sir; I didn't employ him.

Q. Did he stay with you?

A. Yes, sir.

Q. How long?

A. He stayed with me close on to a month.

Q. He staid with you from the time you saw him in April until the killing of this boy, Hanson?

A. Yes, sir.

Q. What did he do?

A. He helped feed my stock, and knocked around with the boys down there, and helped them; had as much work as they could do.

Q. Whereabouts did he stay; in Coffeyville?

A. No, sir; down in the Cherokee Nation.

Q. On the farm?

A. Yes, sir.

Q. Had you a farm down there?

A. Yes, sir; rented a farm.

Q. Who did you rent the farm from?

A. John Morgan.

Q. Whereabouts does John live?

A. In Coffeyville.

193 Q. Did you stay down on the farm too?

A. I was down there backwards and forwards every day, but I didn't stay there nights.

Q. You were there nearly every day?

A. Yes, sir.
Q. Where did this boy stay at nights?
A. He staid on the farm with my father and two boys.
Q. Your two boys are James and Harvey?
A. Yes, sir.
Q. Did you know anything about this boy or your boys having any trouble with Phillip Hanson or the Erne boys?
A. No, sir; only what I heard them say. I never heard Phillip Hanson say anything about it. I never seen him.
Q. You didn't know him?
A. No, sir.
Q. Did you know anything about this boy having a pistol?
A. Yes, sir; I knew that he had a pistol.
Q. Where did he keep the pistol?
A. Kept it in his grip. He offered to sell it to me for board and I didn't want it.
Q. Do you know where he came from?
Oswego, Kansas.
Q. Do you know his parents?
A. Yes, sir.
Q. You have seen his father?
A. Yes, sir.
Q. Where does his father live?
A. He lives in Oswego, Kansas.
Q. Where did you last see his father?
A. I saw him at the preliminary trial at Independence, Kansas.
Q. Is this boy's mother living?
A. No, sir; she is dead.
Q. How did this boy behave himself while he staid with you up to the time of this killing?
A. He behaved himself mighty well; as well as he could, as far as I know of. He was an awful good boy to mind and work, too, while he staid there.
Q. Was he peaceable?
A. Yes, sir; he told me, I believe it was Wednesday, that these boys had threatened him; and I told him not to pay any attention to
194 that; that they were not going to interfere with him; for him to stay right at the house, and when my father came in from town for him to come with him, and the boys would not bother him at all. I told him to be certain not to carry that pistol around over the farm; to leave it right there.
Q. Did you know he had the pistol down on the farm?
A. Yes, sir; why he took the pistol from Coffeyville, he was expecting to move off. I gave him the privilege that he could stay with me until he could get a job, and he did go that week to get him a job and failed to get it, and he came back home and thought that he would wait until later.
Q. How old a man is this boy's father?
A. I could not just tell you.
Q. Do you know whether he has any relatives other than his father or not?

A. He has got a sister in Topeka, Kansas, I believe; that is all I have heard of.

Q. His father and sister is all the relatives you have heard of?

A. Yes, sir.

Q. Do you know about your boys making a statement to Mr. Clifford about this difficulty?

A. I know a little something about it; mighty little.

Q. Were you present when they made the statement?

A. Yes, sir.

Q. Were you present when they made a statement which was reduced to writing?

A. Yes, sir.

Q. How did he happen to call on them for a written statement?

A. He called them up and began to ask them how was it, and they began to tell him.

Q. He wrote it down, did he not?

A. Yes, sir.

Q. What did he want to do that for?

A. I could not tell you.

195 Q. Did you ever write to this boy since you have been in jail here, or since he has been in jail, rather.

A. No, sir; he wrote to me. I never answered it. The reason why I didn't answer it, I could not find the boy that he told me to send word about, and I didn't write.

Q. You never sent him any information about this case at all?

A. No, sir.

Q. Do you know of anybody that ever sent him any information about this case?

A. No, sir.

Q. Or sent any information to his attorneys?

A. No, sir.

Cross-examination by the DISTRICT ATTORNEY:

You say you were present when this boy or these boys of yours made the statement to Mr. Clifford?

A. Yes, sir.

Q. That was at Mr. Clifford's office?

A. Yes, sir.

Q. Did he take your statement?

A. No, sir; I had no statement then, or have I got none now. I don't know anything about the fracas.

Q. He spoke to you, and you told him you didn't know much about it?

A. Yes, sir.

Q. He wrote down a little of what you said; not much difference in that and what you state here. Here is Mr. Clifford's written statement of what you told him: "Statement of Albert Marks: I took the boy to do chores until his father came, who the boy said had sold his farm and was going to Oklohoma," that is what you state here, "in the Indian

196 Territory. The boy staid at the farm, which is about 4 miles from the town of Coffeyville, Kansas."

A. I told him that; yes, sir.

Q. "Alex Allan told me that when he went after Morgan's horses the boys, the Erne boys, and Hanson's boy, said they were going to settle this racket with him. I told him to attend to his own business, and they would not bother him, as I never knew them to come over here and interfere with anyone. This is all I know about the matter."

S. Yes, sir.

Q. That is what you said, is it?

A. Yes, sir.

Q. That is correct, is it not?

A. Yes, sir; it is.

Q. You heard the boys make the statements to Clifford?

A. Yes, sir.

Q. He wrote it down and read it over to them after they made it?

A. Yes, sir.

Q. You heard him read it?

A. Yes, sir.

Q. He wrote it as they said it, didn't he?

A. Yes, sir.

Q. He didn't change it?

A. I don't know anything about that——

Q. He read it to the boys as the boys said it to him?

A. Yes, sir.

Q. After he wrote it down and read it to them, they signed it, didn't they?

A. I don't remember whether they did or not.

Q. He read it to them; you remember that?

A. I remember him reading it to them.

Q. That was done in your presence?

A. Yes, sir.

Q. I suppose you told the boys to just tell the truth about it, didn't you?

A. Yes, sir.

Q. To tell Mr. Clifford just how it was?

A. Yes, sir.

Q. Did you tell both of the boys that?

A. Yes, sir.

197 Q. The boys were young and of course you gave them good advice?

(No response.)

Q. Do you think you would remember the statement they made there if I would read it to you?

A. I don't know, sir; I have a mighty short memory.

Q. You think you would hardly be able to recollect it?

A. No, sir; I don't think I would hardly be able to remember the boys' speech, because I was kind of flustrated m'self.

Q. You wouldn't remember now what they said?

A. No, sir.

Q. But you told the boys to tell the truth about it?

A. Yes, sir.

Q. You saw Mr. Clifford write it down and heard him read the same statement that the boys had made to him, just as he read it?

A. Yes, sir.
Q. How old are you?
A. I was 42 years old last Christmas eve.
Q. How old is this defendant?
A. His father said he would soon be fifteen years old, when I saw him.
Q. Don't you know he is older than that?
A. No, sir.
Q. Don't you know that his father told you he was nearly 18 years old?
A. No, sir.
Q. He told you he was 15, did he?
A. Yes, sir; he told me that he would soon be 15 years old.
Q. Did the boy ever tell you his age himself?
A. No, sir; I don't remember of ever asking him. He might have told me. If he has it has slipped my mind.
Q. You didn't hire him at all, did you?
A. No, sir.
Q. He came to Coffeyville carrying a gripsack and this pistol in it?
A. Yes, sir.
Q. Did he bring any cartridges with him?
198 A. I don't remember; I don't think he did. I think he bought the cartridges after he came there.
Q. Did he tell you where he got this pistol?
A. He told me it was his mother's.
Q. Didn't he tell you that his mother had died and willed the pistol to him?
A. Yes, sir.
Q. How came him to tell you that?
A. My wife was going to take the pistol away from him; she didn't want him to go around on the farm with her boys with the pistol, and she says, "I will take this pistol and keep it," and so she took the pistol and kept it my house in town, in Coffeyville; and she kept it I guess about 2 weeks, and he concluded he would leave, and he would get his things in order and together so when he was hired he would have it, if he got a job anywhere; and so she told him she would let him have it if he would take it down on the farm and let it stay in that grip; and if she ever heard of him having it out around her boys she would fire him and the pistol too.
Q. Were you down there on Wednesday, the time the boys had the trouble with the other boys?
A. No, sir; I wasn't there that day.
Q. When was it that the defendant told you——
A. It was on Tuesday they had the fracas.
Q. All the rest put it later. I expect you are mistaken about it. It does not make any difference.
A. I was down there the next day after the rookis.
Q. Whether it was Thursday or Friday, you were the next day afterwards?
A. Yes, sir.
Q. The defendant told you about it?
A. The day after the fracas was I was down there.

Q. And he told you about it?

A. Yes, sir.

199 Q. He told you that those boys had threatened him?

A. Yes, sir.

Q. Tell us all what he said to you.

A. He told me that he went over there after Mr. Morgan's horses; went across Mr. Erne's field in order to turn the horses back, and he said where he wanted to go across the creek he asked the boys if he could cross there, and they told him yes, and he told them he thought it was swimming, and they says, "You go across here or you won't go anywhere." I don't like to tell ever'thing I hear; I would like to tell what I know myself.

Q. I want you to tell what he said.

A. He said he wanted him to go across there, and he went on up the branch and the boys began to chunk after him, and finally they used profane language to each other.

Q. What did they say backward and forward?

A. I can't remember what he did say they said; got to cussing each other; and they said they would be over Saturday and settle the matter. That is what he told me.

Q. You told him that the boys had never given any trouble, never had been over there, and for him to behave himself and there would be no difficulty, and whatever he did not to carry that pistol?

A. Yes, sir.

Q. What did you tell him that for?

A. I knowed if I got into a fight and had a pistol I would shoot, and I thought maybe he would.

Q. You thought that if he got into a fight with these boys he hadn't better get into it with a pistol?

A. Yes, sir.

Q. So you told him not to carry the pistol?

A. Yes, sir.

Q. Where was the pistol then?

A. It was in the house then.

200 Q. In the grip?

A. Yes, sir.

Q. Where did you say he got the cartridges?

A. Got them in Coffeyville.

Q. How many did he buy, do you know?

A. No, sir.

Q. How do you know he got them there?

A. I know he did.

Q. How?

A. Because I saw him the day that he bought them.

Q. Then you ought to be able to tell how many he had?

A. I can't tell that. A pistol is a thing I never owned in my life.

Q. I don't suppose he would buy enough to load it all around?

A. He had enough to load it all around twice, I think. I know he had that many.

Q. Did he keep the pistol loaded in the grip?

A. He didn't have it loaded when he bought these cartridges.

Q. When he was down at your house did he keep it loaded?
A. Yes, sir; I suppose it was loaded down there. I think he loaded it up in town.
Q. And he kept it in his grip?
A. Yes, sir.
Q. Do you know how he happened to have it on the morning the shooting occurred, that day?
A. No, sir.
Q. At any rate, he always kept the pistol in his grip?
A. That is where it staid all the time I know anything about it.
Q. And you had told him the day before not to carry the pistol?
A. Yes, sir.
(Witness excused.)

201 A. W. KNOTTS, having been recalled for further cross-examination, was examined by Mr. C. J. Frederick, and testified as follows, to wit:

Question. I believe you say you arrested this boy down at Edna, Kansas?
Answer. Mr. Clifford and myself together; yes, sir.
Q. Were there any other officers with you?
A. Charles Davis was along with us.
Q. What officer was he?
A. Charles Davis was deputy sheriff.
Q. You were city marshal of Coffeyville, and Mr. Clifford was deputy marshal for Kansas, and Davis was a deputy sheriff, and you three made the arrest?
A. Yes, sir.
Q. You arrested him in the wheat field 2 or 300 yards from the depot?
A. Yes, sir; he was caught inside of a field.
Q. After you arrested him didn't you shoot off your pistol, or just before you arrested him?
A. Yes, sir; just before.
Q. Did Mr. Davis shoot off his gun?
A. I believe so.
Q. Didn't Mr. Clifford tell you and Mr. Davis not to shoot him, that he would arrest him?
A. I never heard him say anything of that kind.
Q. If Mr. Clifford directed you and Mr. Davis not to shoot him you didn't hear it?
A. Why, I never tried to shoot him; it wasn't my aim to shoot the boy at all.
Q. Didn't Mr. Clifford say for you not to shoot him?
A. I do not remember of he'ring anything of the kind.
Q. At the depot when you brought him back wasn't there quite a crowd gathered around there?
A. Yes, sir.
202 Q. Did not the crowd talk about hanging the boy there?
A. Ther' was a remark made of that kind.
Q. This morning, when I was trying to find out about the conversation there, you did not think to tell me about that?
A. You would not let me tell it. I told you I heard a remark made.

Q. You didn't tell us about that. You didn't tell us about that this morning there?

A. I wasn't asked to tell it.

Q. How can we ask you about things we do not know anything about? They were talking about getting a rope and hanging this boy, were they not?

A. I never heard it; only just one remark made. I never heard a rope mentioned.

Q. You heard him say "Let's hang him?"

A. I heard one man remark "We have got him now; let's hang him."

Q. Didn't Mr. Clifford say "No, you will not do anything of the kind?"

A. Yes, sir; Mr. Clifford said "You will not do any violence to the boy."

Q. Didn't Mr. Clifford tell you to take him and get on the train with him?

A. He turned him over to me, and he said "I wil' go and put my team up."

Q. After you got on the train it was then this boy told you how it was, in answer to your questions?

A. Yes, sir.

Q. Did you tell them they would not hang the boy?

A. I said to him "Come on, young man; you go with me, and I will see you are not hurt."

Q. It was after that you asked him on the train about how it occurred?

A. On the train, going home, he asked me what I thought they would do with him.

Q. You never told him?

A. I told him I didn't know; they were liable t' do right smart.

203 Q. Then you commenced to ask him about it?

A. I asked him; yes, sir.

Q. Did you tell him it would be best for him to tell the truth about it?

A. I did not.

Q. You just simply asked him without telling him anything, did you?

A. I just asked him the question; I asked him if they had any trouble before that, and he mentioned this little quarrel on Wednesday before.

Q. Did you tell him to be careful and not to tell anything about the case?

A. No, sir.

Q. Did you tell him that whatever he might say would'nt be used against him?

A. I did not.

Q. You didn't tell him anything of the kind?

A. No, sir.

Q. But you just simply asked him about how it was?

A. Yes, sir.

Q. Did you handcuff him?

A. I did not.

Q. How did you secure him? You didn't confine him at all, by a rope or anything?

A. I thought I was capable of handling him.

Q. You didn't confine him or tie him?

A. I didn't put any handcuffs on him. I don't remember whether he was handcuffed or not. I never put any on him. I would not say whether he had handcuffs on or whether he did not. I was handling a good many men thos' times, and I disremember whether he had handcuffs on him or not.

Q. You would not say that he was not handcuffed?

A. No, sir; I don't remember.

Q. Don't you think that he was handcuffed; isn't that your best recollection?

A. I have no recollection in that matter.

Q. One way or the other?

A. No, sir; I disremember.

Q. All you said to him about it, you simply asked him questions
204 without telling him anything about it at all, just simply asked him questions.

A. Yes, sir; that is all.

Q. You didn't tell him you would protect him or anything of the kind?

A. I told him that he would not be hurt while he was in my possession.

Q. How come you to tell him he would not be hurt?

A. Because this man proposed to hang him.

Q. Did he seem to be scared or excited about it?

A. He did not.

Q. He didn't call on you to protect him, did he?

A. No, sir; he didn't.

Q. You volunteered to him you would protect him?

A. I said "Come on, young man, and I will see you are not hurt."

Q. It was after you got on the train you asked him about how it happened?

A. After he got on the train he asked me what I thought they would do with him.

The DISTRICT ATTORNEY. Who?

W. What I thought they would do with him for shooting this boy.

Q. What would be done by the court?

A. Yes, sir.

Q. Not the people who said they were going to hang him?

No, sir; he was not talking with regard to them at all.

Mr. FREDERICK (counsel for defendant). He simply asked you what you thought they would do with him?

A. Yes, sir; he said, "What do you think they will do with me."

Q. You told him you could not tell?

A. Yes, sir; I told him I didn't know; they were liable to do right smart.

Redirect examination:

The DISTRICT ATTORNEY. You treated him kindly?

A. Yes, sir.

Q. You don't remember whether you had him handcuffed or not; I would like for you to try and think about that, if you can?

205. A. My impression is that he was handcuffed, but I don't remember now; I would not say for certain.

Q. You say you fired your pistol, but you told Mr. Frederick you didn't aim to shoot him; what was your object?

A. He was running, and I didn't care very much about a race; I was after him. When we went to arrest that boy he was setting on the platform of the depot, and Mr. Clifford says to him, "Come here, sir; come right here to me," and he just looked around and never took his eyes off of us at all, and he turned and run as fast as he could.

Q. Through the field?

A. Ye', sir; I was setting in the bug'y with Mr. Clifford, and I jumped out over the front wheel, and run around the depot; he was on the south side, and I run around the north side and met him, and he run right down the railroad track; and I hollered at him to stop, and it seemed to me that he got faster, and I pulled my pistol as I run and drawed down from fifteen to ten feet in front of him and shot it off across his path there and hollered again to halt; and I could not see any halt, and I knew if I caught him I would have to run him down, and I went about 75 or 80 yards, and I was getting so close to him and he wheeled and went right through a hedge fence into this field we speak of. I didn't see that I could get through there myself without tearing myself considerably, and so I kept down on the outside of the hedge and he on the inside, and in the meantime Mr. Clifford had driven across the railroad track and got into the inside of this field with his team, and he got to him first. The boy then climbed into the wagon and road back to town with Mr. Clifford, and I footed it up the railroad track, and consequently they got there first.

This crowd had gathered up, and when I got there this man re-
206 marked, "We have got him now, let's hang him. Clifford said, "No; you won't." He turned to me and said, "Take charge of this man until I put my team up," and I said "Come on, young man; I will see you are not hurt."

Q. You didn't intend that he should be hurt either, did you?

A. No, sir; I did not. I walked with him right over there, and as soon as the train come we stepped on to it and went to Coffeyville.

Q. That is all there was to that?

A. Yes, sir.

Q. He was running?

A. Yes, sir.

Q. Did you and Mr. Clifford go to Edna in a buggy?

A. Yes, sir; in a spring wagon, in a Singer sewing-machine wagon.

Q. Did you go rapidly?

A. Yes, sir; we drove hard.

Q. You went there for the purpose of arresting him, heading him off?

A. Yes, sir.

Q. Had you a description of him, or had you ever seen him before?

A. I had seen him before, but I didn't know it at the time; I didn't know what kind of a looking fellow I was following. When I saw him at Edna I knew that I had seen him in *twon*.

Q. When you got there you saw him setting at the depot?

A. Yes, sir; on the platform of the depot.

Q. How long wa- that before the train was due?

A. I don't think it was to exceed ten minutes.

Q. The train came while you were there?

A. Yes, sir.

Q. That is the train going back?

A. The train going west.

Q. Towards Coffeyville?

A. Yes, sir.

Q. How long would it be before the train coming from Coffeyville going east would come?

A. I don't remember the train's times.

Q. When you saw him Mr. Clifford told him to come here, and
207 pointed his finger at him, and he broke and run, as you have described?

A. Yes, sir.

Mr. FREDERICK (counsel for defendant). I now move the court to exclude the confession as detailed by this witness, Knotts. In the first place, Knotts goes there as an officer and arrested him in the way in which he details, and the' fire their guns, and take him up to that crowd, and a man there threatens to hang him--he takes him under these circumstances and he asks this defendant to tell him how it was, and I think it is not a voluntary confession, but one that ought not to go in, and I therefore move the court to exclude it.

The DISTRICT ATTORNEY. This witness in his direct examination this morning stated that he lived at Coffeyville, Kansas, that he was city marshal there; that he helped to arrest the defendant; that he took him from Edna to Coffeyville; that the defendant had a little scratch on his face, very small; that the defendant asked the witness what the witness thought they would do with him (the defendant); that this was on the train; that the witness told the defendant he didn't know; that the witness asked the defendant if he knew that he (the defendant) had killed a boy; that the defendant said he knew he had shot him, but didn't know that he had killed him; that defendant said that a man had shot him in Oswego, and they didn't do anything with him; that the witness asked the defendant what he shot that boy for, and defendant said he was afraid they would hurt him with the sticks; that the witness asked him what sticks, and he said with some sticks they were carrying; that
he asked him if they struck him with the sticks, and he said
208 no, but was afraid they would, and that was all that was said in regard to it. The witness stated that the defendant had on shoes, he thought; that he knew he wasn't barefooted. That is the state of facts that the witness details. On the cross-examination the gentleman representing the defendant asked the witness if he had made any threats; he asked him if anybody had, and the witness said he heard a conversation, and then the gentleman asked him what it was, and he said it wasn't but a remark, and he wanted to go on and tell what it was, and Mr. Frederick would not allow him to do it, and there was a controversy sprung up about that. Your honor will remember that the gentleman opposing me would not allow this witness to tell what the remark was when he cross-examin*in* him this morning, but he got the remark out this time. The witness now states that he and Mr. Clifford went there from Coffeyville to Edna, distant about 16 miles; that they went in a sewing-machine wagon; went very hurriedly, and when they got there they saw this boy sitting down on the platform of the depot; that Mr. Clifford threw out his finger and said to him: "Boy, come here; I want you." That the boy looked at him, and, without taking his eyes off of him, picked up his grip and turned and run, and as the boy run the witness run after him to try and

capture him, running around a certain way, and as he run he fired his pistol in front of him to stop him, about 10 feet in front of him, for the purpose of stopping him, but the boy seemed to go faster. He then saw that he had to catch him. Of course he did not want to kill the boy. And so he went to running after him, and got pretty close up and the boy made a lunge and went through a hedge thicket which the witness could not go through, and that Mr. Clifford succeeded in arresting him; that when the witness got
209 up to where Mr. Clifford had the boy there was a crowd there, and he heard one man say, "We have got him; let's hang him;" and Mr. Clifford said, "No; you will not do anything of the kind;" and turned around told this witness to take charge of him. The witness then said to the defendant, "Come with me and I will see that you are not hurt," or "they shan't hurt you," and they went to the depot and remained there ten minutes until the train came. Then they got on the train, and as they were going down to Coffeyville, Kansas, the boy asked the witness—well, without stating the conversation, which your honor remembers, the defendant asked him what he thought they would do with him, and the witness said that he was not talking about the crowd at all, but about the officers of the law, what would they do with him, and then from that the conversation went on from one thing to another, as I have stated to your honor. Now, Mr. Frederick, the gentleman who represents the defendant was very particular to ask the witness, "Did you offer him any inducements?" and the witness said he did not. The witness was then asked if he threatened the defendant, and he said he did not; and he was asked if he told the defendant it would be better for him if he would tell, and he answered that he did not. He says that he would have protected the boy at any time, and he says there was no threats made to him at all, and no inducements made for him to make this statement, and that it was a voluntary statement.

Mr. FREDERICK (counsel for defendant). In reference to that controversy this morning, I did not object to the witness stating what he states on the stand now, but I wanted him to ask a certain question, and then go on, and he hesitated about doing so, and finally went off of the stand without answering that at all.

210 Now, if the court, please, here is a statement not volunteered by the defendant, but in answer to questions propounded by the officer who had him in charge, the officer too, who had a few minutes before fired on him, and another officer had fired, then having carried him up before a crowd of people, who said, "Now we have got him, let's hang him," and the defendant at that time in the hands of the same officer, handcuffed, and being excited, was asked by this officer, "Tell me how it was; what did you shoot him for?" and he goes ahead then and gives an answer. And he is asked, "Did they hit you with sticks?" He answers "No," everything being drawn out by the officer putting direct questions to the witness, and it was not voluntary on his part. The only thing voluntary on the part of the defendant, according to the statement of this witness, was "What do you think they will do with me?" and he says, "I don't know; I think they will do a great deal," or something like that. Then he asked him again, "What did you shoot him for?" and then he gave the answer; and then he was asked, "Did they hit you with their sticks," and then he gives the answer.

I submit to the court that it is not a voluntary statement, and not one made under such circumstances that it should go against him in a case like this, in view of the further fact, too, of the age, the youthfulness of the defendant.

The COURT. The fact of his being under arrest would not exclude it; nor would the fact that the questions were put to him by the officer exclude it. The only ground where there could be a possibility of exclusion would be that the statement comes from the hope of reward or through fear. Of course, there is no hope of reward that could cut any fig-
211 ure in the case. The only thing in the law that could militate against the competency of the statement would be that it was given under the influence of fear. I do not think that the evidence shows that it was based upon that. The court certainly has a right to take into consideration the conduct of the boy, the extent to which any threats may have operated upon him, or the opportunity there was for it operating upon him. There was but the declaration made by one man who did not have him in charge, and that was counteracted by the assurance of the officer who did have him in charge that he should not do anything of that kind. This officer assured him protection, and the very fact that he asked the officer what he thought they would do with him—meaning, of course, the court—showed that he had confidence in the officer, and I do not think it is such a statement as should be excluded on the ground that it was obtained under the influence of fear.

The DISTRICT ATTORNEY. There is thr further fact that he was away from the place where he was arrested.

The COURT. Yes, sir; and both officers had assured him the fullest protection as strongly as they could.

The motion to exclude will be overruled.

Defendant excepted.

Witness excused.

Here court adjourned until Monday morning, Feb. 13th, 1893.

212 MONDAY MORNING, *February 13th*, 1893—9:00 o'clock.

ALEXANDER ALLAN, the defendant, having been duly sworn in his own behalf, was examined by his counsel, Mr. C. J. Frederick, and testified as follows, to wit:

Question. What is your name?
Answer. Alexander Allan.
Q. How old are you, Alex?
A. 15 years old this coming March.
Q. Where do you live when you are at home?
A. I live at Oswego, Kansas.
Q. With whom do you live when you are at home?
A. I live with my father.
Q. Is your mother living?
A. No, sir.
Q. Your mother is dead?
A. Yes, sir.
Q. How long has she been dead?
A. Eleven years.
Q. Where is your father?

A. He is at home.

Q. When did you leave home, Alex?

A. I left home along the first of May, I think; somewheres along there.

Q. How long had you been away from home before this killing occurred?

A. I had been away from home about three weeks, I guess.

Q. Why did you leave home, Alex?

A. I just went off.

Q. Why did you say you left home?

A. I left home just because I wanted to.

Q. That is a very good reason. I will have to go along and ask you further in order to get you to tell us more definitely why you left home. If you have got any reason, state it.

A. I wanted to get some work to do.

213 Q. I want to know whether you went away at your own instance, or whether or not your father sent you away.

A. I went away on my own account; my own self.

Q. Where did you go to when you left home? You left home to go where?

A. I went to Coffeyville, Kansas.

Q. How came you to go to Coffeyville?

A. I started out to Oklohoma, and I went there, and thought I would get some work to do until my father came along.

Q. Was your father coming?

A. Yes, sir.

Q. You went to Coffeyville, Kansas?

A. Yes, sir.

Q. With whom did you get work there, if anybody?

A. I was working there for Albert Marks.

Q. Go on, and tell us now what you did at Albert Marks', in a brief manner. Whereabouts did you work for Albert?

A. Down in the Nation, four miles south of Coffeyville.

Q. When did you first see the Erne boys, and this boy, Phillip Hanson?

A. I think it was on the 4th day of May.

Q. Where?

A. Me and James Marks went out to hunt some horses for John Morgan, and run across these boys, and asked them if they had seen anything of the horses, and they said, "Yes," and I asked them whereabouts was they, and they told me they were across the creek, and I asked them where was the best place to cross the creek at, and they told me right down there, and it was mud and water waist deep, and I would not cross there, and they told me I would cross there or not cross any place; and so James Marks told me to come on, let's go up a little further, and we started on up there further, and they kept following us and cursing us.

Q. Tell what they said.

214 A. Phillip Hanson call me a damned nigger, and told me I would cross there or not cross any place.

Q. What did you say?

A. I never said anything to him.

Q. Go ahead and tell us what they said there now.

A. And this James told me to come on, let's go up a little further, and we went up there where the straw stacks was on the side of the creek, and crossed on some brush, and they kept following us up, and I seen the horses, and I went on and caught mine and got on it, and James caught his, and then as we were going back with th'm there at the creek, and they commenced throwing some sticks and rocks at me—the sticks had drifted up on the bank where there had been high water—and they commenced throwing them at me and struck my horse twice, and I went on——

Q. Did they say anything?

A. Yes, sir; Phillip Hanson pulled off his hat and threw it down on the ground, and said he was going to kill that damned nigger the first chance he got.

Q. Did you say anything back to him?

A. I never said anything. My horse was in a trot then. And he throwed some sticks and struck my horse twice, and he wanted to borrow James Marks's horse to catch me with.

Q. Where did you go?

A. I went on home; and he said he would come and settle it with me Saturday.

Q. Who said so?

A. Phillip Hanson.

Q. How long was that before the shooting?

A. That was on Thursday.

Q. Thursday before the shooting on Saturday?

A. Yes, sir.

Q. Did you see them any more that day?

A. No, sir.

Q. Did you see them the next day, Friday?

A. No, sir; I never saw them until Saturday.

Q. What were you doing Saturday?

215 A. Me and old man Marks went out to get a load of hay to take to town, and got about half way to town and met his little grandson, Harvey, going down on the farm after some milk, and he sent me back with him, and while I was down there went down to skim the cream and put it in the churn, and started out to the cart, and I heard someone holler, and I looked back; I thought it was Harvey; and then he hollered and told me there was them boys coming through the fence.

Q. Who did?

A. Harvey hollered and told me that. And they told me to hold on, and I set the churn down, and they come on to me, and I asked them where they were going, and they said they were hunting niggers.

Q. Who said they were hunting niggers?

A. Phillip Hanson.

Q. When you say "them" you do not mean all three of them, do you?

A. Phillip Hanson said they were hunting niggers, and I asked him if the' had found them, and he said "Yes;" he had found one; that was me.

Q. You say you saw him through the fence?

A. Yes, sir; through the fence, between the hogpen and stable.

Q. Did they get through the fence?

A. Yes, sir; and come in the yard where I was working at.

Q. What did they do?

A. Phillip Hanson struck me on the head with a club and I struck him with my fist, and then me and him got into a tussle and he throwed me down, and George Erne struck me on the arm with a club, and I asked them to let me up and they wouldn't do it, and I scrambled around and got hold of my gun; it was in my hip pocket.

Q. Was it a gun or pistol?

A. It was a pistol. I got hold of it and pulled it out, and Phil-
216 lip Hanson grabbed it and it went off, and then I jerked loose from him, and George Erne had hold of my arm, and I turned and shot him then.

Q. Shot who?

A. George Erne.

Q. Go on and tell us about it.

A. That is all of it.

Q. The pistol went off once, and you shot George Erne; is that all?

A. I shot Phillip Hanson twice.

Q. Tell us about that; you haven't told us about that.

A. As well as I remember, I shot him twice and shot George Erne once through one of his arms.

Q. Did you know that until you heard it here?

A. No, sir; I didn't know that I had killed that fellow at all.

Q. Did you know that you had hit him?

A. No, sir.

Q. After the shooting, what became of the boys, Phillip and George?

A. We all started to run about the same time; they were running one way and I another.

Q. Where did they go?

A. This here Phillip Hanson got about 15 steps over the fence, on the other side of the fence.

Q. Did he get through the fence?

A. Yes, sir; he got on the other side of the fence.

Q. What became of the other boys; did they get on the other side, too?

A. Yes, sir.

Q. You had your pistol in your pocket?

A. Yes, sir.

Q. When did you put your pistol in your pocket?

A. I put it in there while I was in the house.

Q. While you were in the house when?

A. When I came back after the cream.

Q. Did you have that pistol with you when you met the little boy Harvey?

A. No, sir.

217 Q. When you come back with him you got the pistol?

A. Yes, sir.

Q. Where was that pistol when you got it, before you put it in your pocket?

A. It was in the house in my overcoat pocket, in the inside overcoat pocket, hanging up by the side of the house.

Q. When had you put it in your overcoat pocket?
A. About two days before that.
Q. Why did you put your pistol in your pocket that day?
A. I had it out of my grip; I got it out and shot a crow that day that was on the shed sucking eggs, and I killed the crow with it, and I took it back and put it in my overcoat pocket.
Q. On Saturday, when you went back down there, when you went in the house, you got it and put it in your pocket. Why did you do that?
A. I was going to go down and drive the cows up. The cows had broke out of the pasture.
Q. Before you carried the milk down to Coffeyville?
A. Yes, sir.
Q. Why did you want to carry the pistol to drive the cows?
A. I thought I might shooting down there; that I might see something I would want to shoot—something or another.
Q. Is that the reason you had it?
A. Yes, sir.
A. Did you have your pistol in your pants pockets when you saw those boys coming?
A. Yes, sir.
Q. You did?
A. Yes, sir.
Q. You didn't go and get it after Harvey said, "Yonder comes these boys?
A. No, sir; I already had it in my pocket.
Q. How was it loaded, all around?
A. No, sir; it only had four loads in it.
Q. When it was exhibited here the other day it only had one load in it.
A. Yes, sir.
Q. How many did it have in it when you went away?
A. One load.
218 Q. You heard one witness say that you told him that you had shot it off at a rabbit as you went on down to Edna, did you?
A. No, sir; I did not.
Q. Did you hear what the witness testified here last week?
A. Yes, sir.
Q. One witness, I believe it was either Mr. Knots or Mr. Clifford, said you told him that you shot it off at a rabbit as you went on down to Edna?
A. I didn't tell him that at all.
Q. Did you shoot your pistol any more after you left Marks's place?
A. No, sir; I didn't; there was but one load in it after I left there, and it is in it now, I guess.
Q. After you shot you saw the boys running, and you run, too; where did you go?
A. I started home.
Q. What home?
A. Oswego, Kansas.
Q. How did you leave Marks's place?
A. I left there in a cart.
Q. Go on and tell us about that trip.

A. I went in the house and got my satchel and left there in a cart; I went on then to the depot and got off, and the little boy went on over to the house, and I started on home.

Q. How did you start?

A. On foot.

Q. What route did you go?

A. I went right east.

Q. Did you go the dirt or rail road?

A. I went the railroad.

Q. Tell us all about it; you went the railroad?

A. Yes, sir.

Q. How far did you go?

A. I went 16 miles; I went to Edna, Kansas.

Q. Did you walk?

A. Yes, sir.

Q. You were at Edna, Kansas, when you were arrested?

A. Yes, sir.

219 Q. How long had you been there when these officers came?

A. I had been ther' about half an hour.

Q. What were you stopping there for?

A. Just because I wanted to; I was tired walking.

Q. Go on and tell us how you were arrested.

A. They seen me setting there at the depot, and this Marshal Clifford threw his gun down on me, and told me——

Q. Did you know either one of these officers?

A. No, sir; I did not.

Q. Did you know they were officers at all, then?

A. No, sir.

Q. Well, go on.

A. He threw his gun down on me and told me to come to him, and I started the other way.

Q. Why?

A. I didn't know who it was.

Q. Go on, and keep telling us.

A. They shot at me three times before they got me.

Q. You *run*, too?

A. Yes, sir.

Q. Tell that; tell it all.

A. I *run*, and they shot at me three times; it was south of the depot in the field where they arrested me.

Q. Go on.

A. That is all, I believe, I know about it.

Q. You kn'w whether they carried you away from there or not?

A. Yes, sir.

Q. Go on and tell us.

A. They carried me back to Coffeyville.

Q. They carrie' you back up there to the depot, too?

A. Yes, sir.

Q. Did anything happen up there? Go on and tell us what was done.

A. I heard some one say, "Let's hang him;" I don't know who it was; he said, "Let's hang him while we have got him."

Q. You didn't know anyone there, did you?

A. No, sir; I had an idea it was Marshal Clifford said that.

220 Q. No difference about your idea; you heard somebody say that?

A. Yes, sir.

Q. Go on.

A. They carried me on from there to Coffeyville, and put me in jail.

Q. "They?" They didn't carry you, did they?

A. Mr. Knotts carried me over there to Coffeyville, and put me in jail.

Q. Anything happen on the way to Coffeyville? Did you tell Mr. Knotts anything about the way the thing happened on the way to Coffeyville on the train?

A. No, sir; I did not.

Q. Alex, did you hear Mr. Knotts testify you told him that you shot that boy because you were afraid they would hit you with the sticks?

A. No, sir; I heard Mr. Clifford say that.

Q. No; it was Mr. Knotts was the man. He said you said that on the train. And did you hear Mr. Knotts say, too, when he asked you if they hit you with the sticks, say that you told him they did not? Did you hear him testify to that?

A. Yes, sir.

Q. Did you tell him anything of the kind?

A. No, sir; I did not tell him that they didn't hit me with the sticks, because they did.

Q. You heard Mr. Knotts say he saw a scratch on your face; were there any marks or scratches on your face?

A. Yes, sir; there was a scratch under this eye.

Q. How did you get that scratch?

A. There was a calf kicked me about a week or two before that.

Q. It wasn't fresh?

A. No, sir.

Q. You didn't get that in the fight?

A. No, sir.

Q. Did you get any bruises or wounds in the fight?

A. Yes, sir; I got a bruise on me left elbow here.

221 Q. How was that made?

A. Where George Erne struck me with one of those clubs.

Q. What part of the difficulty did George Erne hit you there?

A. He struck me there when me and Phillip Hanson was scuffling.

Q. While you were standing up or lying down?

A. Yes, sir; while we were standing up.

Q. Made a bruised place?

A. Yes, sir.

Q. Make any scar?

A. There ain't no scar there, but there is a lump there.

Q. Now?

A. Yes, sir.

Q. A lump there now from that same stroke?

A. Yes, sir; it is a kind of a rising of some kind. It started from the bruise.

Q. You say it made a rising?

A. Yes, sir.

Q. How long did it take it to heal up?

A. There was a scab on it when I was in the Independence jail, about three weeks after they arrested me.

Q. Now, tell us what parts of your body were hit with the stick, whereabouts you got the blows with the sticks?

A. I got them in the back, four or five times in the back, and then I was struck on the head up here once, and then I was struck on the arm. That is all, I believe, I remember where I was struck with sticks.

Q. That is as well as you remember?

A. Yes, sir.

Q. Did you ever have any fusses before, or fights?

A. No, sir.

Q. Did you hear Mr. Knotts say that you told him when you asked him what they would do with you, he told you they might do right smart, and you said that a man had shot you up at Oswego, and they didn't do any thing with him?

A. I heard him say that, but I don't know anything about it.

222 Q. Did you tell him that?

A. No, sir.

Q. Did any man shoot you up at Oswego?

A. No, sir; I never was in any trouble before in my life before this.

Q. Did you have your scabbard with you when you had the pistol in your pocket?

A. Yes, sir.

Q. Did you have the same scabbard?

A. Yes, sir.

Q. What did you do with it?

A. Throwed it towards Harvey Marks.

Q. When?

A. When I got in that scuffle.

Q. Before or after you shot?

A. After I shot.

Q. After you did the shooting?

A. Yes, sir.

Q. Had you given the scabbard to Harvey Marks before you went out where the boys were?

A. No, sir.

Q. Did you get the scabbard after the shooting?

A. No, sir; it was when the shooting was going on. I first grabbed for the gun, and it fell out of my pocket, and I slung it towards Harvey.

Q. After the shooting was over did you get the scabbard any more.

A. Yes, sir.

Q. Where did you find it?

A. I found it laying a few steps from where I throwed it on the ground.

Q. Do you know where Harvey was during the fight?

A. He was standing there at the house, somewheres along there.

Q. Did you shoot at the little boy Willie?

A. No, sir; I didn't.

Q. Did you snap your pistol at him?

A. No, sir; I never done nothing to him.
Q. Did you snap your pistol at him and tell him to get?
A. No, sir.
Q. You heard the witnesses testify to that?
A. Yes, sir.
223 Q. You didn't do that?
A. No, sir; I didn't.
Q. Have you seen or talked with any of your friends or acquaintances since you have been put in jail here?
A. No, sir; I have not.
Q. Have you seen any of the Marks?
A. No, sir; I have not. I haven't seen any of them down here. The first I seen of them was the other day I seen them up here.
Q. Here in the court room?
A. Yes, sir.
Q. Never talked with them?
A. No, sir; I never talked with any of them since I got in this trouble.
Q. Has your father been to see you?
A. No, sir.
Q. Have you got any other kin folks excepting your father?
A. No, sir; only a sister. I have got some kin folks in Columbus, Ohio.
Q. Where is your sister?
A. In Oswego, Kansas.
Q. Has she been to see you?
A. No, sir.
Q. Have any of your relatives or kin folks been to see you?
No, sir.
Q. Whose horses were you hunting on the other side of the creek on Thursday?
A. We were hunting John Morgan's.
Q. Who is John Morgan?
A. He is a colored man that lives there in Coffeyville, Kansas, in town. He has his horse in the care of the man what I was working for.
Q. One of the witnesses, I believe it was Willie Erne, said that you told Phillip that you understood he had—or Phillip told you that he had understood that you accused him of running Morgan's horses off?
A. He told me that he did; I never accused him of nothing. He told me that he did.
224 Q. Who told you?
A. Phillip Hanson told me that he run the horses across the creek.
Q. Did you tell Mr. Morgan about it?
A. No, sir; I didn't; I have never seen Mr. Morgan since.
Q. Have you seen him since that Thursday?
A. No, sir.
Q. Did you see him Saturday or Friday?
A. No, sir.
Q. Have never seen him since Thursday?
A. No, sir.

Q. You haven't seen him since the day you saw these boys on the creek, on that Thursday when you were hunting these horses?
A. No, sir; I think not.

Cross-examination by the DISTRICT ATTORNEY:

Q. How far is it from Oswego to Coffeyville?
A. 45 miles.
Q. Did you walk?
A. No, sir.
Q. How did you come down?
A. I came down on the train.
Q. The train that runs through Edna comes to Coffeyville, does it not?
A. Yes, sir.
Q. That goes to Oswego, does it?
A. Yes, sir.
Q. What did you want to go to Oswego for on the day that you killed Hanson?
A. I thought it was best to get away from there.
Q. Why?
A. Because I didn't want to get into any more trouble.
Q. What trouble did you expect to get into?
A. I didn't expect to get into any more.
Q. Then why did you leave?
A. Because I thought it was best.
Q. Why?
A. I say because I thought it was best to leave there.
Q. Why did you think it was best?
225 A. Because I didn't want to stay there any longer.
Q. Didn't want to be arrested?
A. No, sir.
Q. Was that it; you left, then, because you didn't want to be arrested?
A. Yes, sir.
Q. Now let us see. In the morning you went out with Albert Marks; old man Albert Marks?
A. No, sir; it was the old man.
Q. What is his name?
A. William.
Q. You got a load of hay?
A. Yes, sir.
Q. Where was the hay?
A. It was down in his pasture
Q. How far from the house?
A. It was about 400 yards.
Q. You went down there to get a load of hay?
A. Yes, sir.
Q. Then what did you do?
A. Started on to town.
Q. With the hay?
A. Yes, sir.
Q. You and the old man?
A. Yes, sir; me and him and James.

Q. How far did you get before you met Harvey?
A. We got about halfway to town.
Q. Then you turned around and came back?
A. Yes, sir; the old man told me to come back with Harvey.
Q. You came around and came back with Harvey?
A. Yes, sir.
Q. Did you milk that morning; milk the cows?
A. I don't remember whether I milked or not; I think it was James that milked.
Q. Then you came back with Harvey?
A. Yes, sir.
Q. When you came back to the house there was nobody but you and Harvey there, was there?
A. No, sir.
Q. Nobody but you two boys?
A. No, sir.
Q. You are a good deal bigger than Harvey?
A. Yes, sir.
Q. You had put your pistol in your pants pocket that morning?
A. No, sir.
226 Q. What morning did you put your pistol in your pants pocket?
A. It was that same day, but it wasn't in the morning.
Q. It wasn't in the morning?
A. No, sir.
Q. You put it in your pants pocket after you came back to the house, did you?
A. Yes, sir; I did.
Q. Where was Harvey?
A. He was out at the buggy.
Q. You put it in your hip pocket, did you?
A. Yes, sir.
Q. You hadn't seen these boys then?
A. No, sir; I hadn't.
Q. Had you skimmed the milk?
A. No, sir; hadn't skimmed the milk.
Q. You skimmed the milk afterwards, did you?
A. Yes, sir.
Q. What were you going to do with the milk?
A. Was going to take it to town.
Q. You and he both?
A. Yes, sir.
Q. Why didn't you let Harvey skim the milk and you go on down and drive the cattle out?
A. He wasn't big enough. His folks didn't allow him——
Q. Tell me what you put your pistol in your hip pocket for?
A. I was going to go down and drive the cows back, and I thought I might see something to shoot.
Q. Did you always carry your pistol when you went to drive the cows up?
A. No, sir.
Q. Did you ever carry it before on that place?

A. Yes, sir.

Q. Didn't you hear the old man testify that he told you that you must not carry the pistol on the place, and you didn't do it, and you kept it in your valise?

A. I was allowed to carry it on the place, but not in town.

227 Q. Marks did not tell you that you must not carry it about the place, and it is not true you kept it in your grip?

A. It was in the grip part of the time.

Q. How long was it in the grip?

A. It had been in the grip two or three days.

Q. How many days were you there?

A. I was there about three weeks.

Q. Then it wasn't in the grip except for two or three days; is that right, sir?

A. How is that?

Q. The pistol was only in the grip three days, was it?

A. Yes, sir; it was in the grip longer than that while I was there, but I mean it was only in the grip about three days until I had it out.

Q. What day was it that you had it out?

A. I killed a crow with it one day that was sucking eggs.

Q. It never was in the grip after that, according to what you say?

A. Yes, sir; it was.

Q. You told Mr. Frederick, your counsel, that you took the pistol out of the grip to shoot a crow that had been sucking eggs, and you then put it in your overcoat pocket, and it remained in your overcoat pocket until the day of the shooting, and you took it out of the overcoat pocket, and had it in your hop pocket. That is what you said. When you took the pistol out of your grip to shoot a crow, that was but three days before this killing, you said. If it was three days before this killing it was the very day that you had the fuss with three boys down at the straw stack, was it not?

A. No, sir.

Q. How many days before the killing was it you had the fuss with the boys?

A. Two days, I think.

228 Q. Then you took the pistol out of the grip and put it in your overcoat pocket, did you, after you shot the crow?

A. Yes, sir.

Q. And it remained there until the day you saw the boys and did the shooting, didn't it?

A. Yes, sir.

Q. Then it wasn't in the grip any more after that?

A. Yes, sir; it was in the grip when I went off.

Q. You put it back in the grip when you went off?

A. Yes, sir.

Q. What did you put it back in the grip for?

A. Because I did not want to carry it.

Q. You were afraid somebody would see it?

A. No, sir; I wasn't afraid, but I didn't want to carry it that way.

Q. But three days before the killing you took it out to shoot a crow and put it in your overcoat pocket, and then on the day of the killing, before

you shot these boys, you put this pistol in your hip pocket; you were going to drive the cows out of the pasture, and you thought you might see something to shoot at. What did you expect to see?

A. I thought maybe I would see a rabbit.

Q. I suppose you have killed a good many rabbits with a pistol?

A. Yes, sir; a good many.

Q. You are a good shot. Where did you get the pistol?

A. I got it at home.

Q. Who gave it to you?

A. There was nobody gave it to me.

Q. Where did you get it?

A. I got it out of my father's trunk.

Q. Where did you first get it?

A. That is where I first get it.

Q. You first got it out of your father's trunk?

A. Yes, sir.

Q. Then, when was that?

A. That was when I left home.

Q. How came you to get it out of your father's trunk?

A. Because I was going off.

229 Q. Did he tell you to take it?

A. No, sir.

Q. You slipped it, did you?

A. Yes, sir.

Q. What did you take it with you for?

A. Because I was kind of scared to go off from home without I had——

Q. Scared to go off with'ut a pistol in Kansas?

I was going in the nation.

Q. Your mother didn't will it to you in her will?

A. No, sir.

Q. You never told anybody that?

A. No, sir.

Q. You have heard the witness testify that you did?

A. I never said it; they testified to something that was wrong if they testified to it.

Q. You didn't tell anybody that your father had given it to you, did you?

A. No, sir; I never.

Q. You didn't tell old man Marks or either one of the Marks boys either one of these things?

A. No, sir.

Q. You heard one of the Marks boys, your own witness, testify that you said your mother had willed it to you?

A. I wasn't asked by any of them where I got it.

Q. How did that little Marks boy get that idea in his head, that you had claimed your mother had willed it to you?

A. I don't know.

Q. Did you tell old man Marks or the boys, either one of them, that your father had given it to you?

A. No, sir; they were not asking me where I got it.

Q. Didn't the old man, William Marks, the one that is here—that is William, is it not, or is it Albert?

A. They are both here.

Q. Is the old man here?

A. Yes, sir.

Q. Which one was it that was on the stand?

230 A. They were both on the stand.

Q. Did either one of these men tell you that you must not carry that pistol about the place?

A. The old man told me that I must not take it to town——

Q. I asked you if either one of them told you thaty ou must not carry it about the place; that you might get into trouble?

A. No, sir.

Q. The truth of the matter is, you did carry it about the place?

A. Yes, sir; part of the time; I hardly ever, though.

Q. You didn't have it the day you had the trouble down at the straw stack with the boys, did you?

A. No, sir; I never.

Q. Now, then, you went down to this house after you came back with Harvey, you went to the house, and you put your pistol in your hip pocket, and you then went down—where was the milk; in the house?

A. Yes, sir.

Q. You then went and skimmed the milk and put it in the churn, didn't you?

Yes, sir.

Q. What did you do with the churn?

A. We were carrying the churn out to the buggy——

Q. How far was the buggy from the house?

A. About 25 steps; hitched at the gate at the cow lot.

Q. Hitched to the gate, just above the cow lot, was it not?

A. Yes, sir.

Q. Who carried it?

A. I was carrying it myself.

Q. You was about 25 yards from the house to that cow lot?

A. About 25 steps.

Q. You were carrying the milk out there?

A. Yes, sir.

Q. Where was Harvey?

A. He was back towards the house.

231 Q. What was he doing there?

A. I don't know; I never looked back.

Q. You carried the milk out; what did you do with it?

A. I got it there pretty near to the gate, and I h'ard some one holler and I looked around; I thought it was Harvey, and he hollored and told me there was some boys coming through the fence, and I set it down then and stopped and looked around to see who it was.

Q. You didn't tell Harvey, "There they come," but Harvey told you?

A. Yes, sir.

Q. You are sure of that?

A. Yes, sir.

Q. You didn't go out there and see them and have trouble with them, and then go back to the house and get your pistol, and then go out and see them?

A. No, sir.

Q. You had your pistol with you?

A. Yes, sir.

Q. When you saw them coming and set down your milk, then what did you do; did you have the cart right where the milk was set down?

A. Yes, sir; right close to where I set the milk down.

Q. The boys come over the fence, and you asked them what they wanted, and they said they had come to kill a nigger?

A. Yes, sir.

Q. They said they wanted to find one; you asked them if they had found one, and they said they had found you?

A. Yes, sir.

Q. He then struck you over the head with the stick?

A. Yes, sir.

Q. You hit him with your left hand?

A. Yes, sir.

Q. Why did you hit him with your left hand?

A. One hand is as good as the other.

Q. Are you left handed?

A. No, sir.

Q. What did you use it for?

A. One hand is as good as the other.

Q. Not with a right-handed man it is not. Why did yo do that?

232 A. I don't know; he struck me with a club, and I struck him.

Q. You admit you struck him with your left hand, and you are right-handed?

A. I will strike a man with either hand.

Q. Do you usually strike a man with your right or left hand?

A. I strike him with either hand.

Q. Had you ever struck a boy with your left hand while you were fighting?

A. No, sir; I hadn't.

Q. Why did you strike this one with your left hand?

A. He struck me with a stick.

Q. You heard this little Marks boy swear that you had a pistol in your right hand when you struck him with your left?

A. No, sir; I did not have any pistol in my right hand at all.

Q. Why strike him with your left hand?

A. He struck me with the club, and I hit him with either one of my hands. I can strike as hard with one hand as the other.

Q. You are right-handed?

A. Yes, sir.

Q. Why do you say you can strike as hard with one hand as you can with the other?

A. Because I can.

Q. You struck him with your left hand?

A. Yes, sir.

Q. Then you got to struggling?

A. Yes, sir; got into a scuffle.
Q. And he throwed you?
A. Yes, sir.
Q. And then George Marks struck you over the head?
A. Yes, sir. No; George Marks struck me on the arm with a stick.
Q. That is the first time he struck you with a stick?
A. Yes, sir.
Q. When was it that he struck you the other time with the stick, while you were down?
A. Yes, sir.
Q. The other man had you down, did he?
A. Yes, sir; he had me down on my side.
233 Q. Was he on your back?
A. No, sir; he wasn't on my back; he was setting straddle of me; I was laying on my side.
Q. You shot him while you were laying on your side, did you?
A. Yes, sir.
Q. You are sure of that, on the ground?
A. Yes, sir.
Q. Were you lying down when you shot Erne?
A. Yes, sir; when I shot Erne I was about half way up; I wasn't lying down whe' I shot him.
Q. How far was Erne from you when you shot him?
A. He had hold of one of my hands, you know.
Q. About how far?
A. He was over me when he had hold of one of my hands.
Q. He had hold of one of your hands when you shot him?
A. Yes, sir.
Q. Which hand did he have hold of?
A. He had holf of my right hand, I think.
Q. I thought your pistol was in your right hand?
A. No, sir; it was in my left hand then.
Q. What did you change it for?
A. To keep him from getting hold of it. He was trying to take it away from me.
Q. Erne was trying to get hold of it, was he?
A. Yes, sir; Erne and Hanson both were trying to get hold of it.
Q. Hanson had the death wound on him then; you had killed him?
A. No, sir; he just kept fighting; just the same as if he wasn't shot at all.
Q. He did, did he?
A. Yes, sir.
Q. The pistol went off once before you were thrown, didn't it?
A. No, sir.
234 Q. You say that Hanson grabbed yo'r pistol when the first shot was fired—he had hold of it?
A. Yes, sir.
Q. Where did that ball go?
A. It went into him, I think.
Q. You think it went into him?
A. Yes, sir.

Q. When he had you down, both boys pounding at you with a club, he was struggling over the pistol, holding on to it, and you think it went into him?

A. He wasn't pounding then; he had hold of the pistol.

Q. What was he doing when you shot him the second time?

A. He had hold of the pistol yet. It went off twice while he had hold of it.

Q. Which hand did he have hold of the pistol with?

A. I think he had hold of it with his left hand.

Q. When both shots were fired?

A. Yes, sir.

Q. He had hold of the pistol with his left hand when both shots were fired?

A. Yes, sir.

Q. Was he still on you?

A. No; I was about half up when he had hold of it.

Q. When the second shot was fired you were about up?

A. We were scuffling.

Q. When the second shot was fired, or the first?

A. The first one and the second one too.

Q. When did he let go of the pistol?

A. I jerked it loose from him; he didn't let go of it at all.

Q. After the second shot was fired?

A. Yes, sir.

Q. During all this time George Erne was helping, was he?

A. Yes, sir.

Q. As soon as you jerked the pistol away from Hanson then
235 George got hold of it?

A. Yes, sir; George had hold of one of my hands, and Hanson had hold of the revolver, and I jerked loose from him, and I wheeled and shot George through the arm.

Q. When you fired the last shot George had hold of the other hand?

A. Yes, sir.

Q. He had which hand, the right or left?

A. It was the left hand, I think.

Q. You told me he had hold of your right hand, and you had your pistol in the right hand?

A. I don't remember now.

Q. You shot George with your left hand, didn't you?

A. Yes, sir; I did.

Q. Then he must have had hold of your right hand?

A. I guess it was.

Q. Then you must have had the pistol in your right hand when you shot the other boy?

A. It was in my left hand, I think; I do not remember now; it has been so long ago I have pretty nigh forgotten how it did happen.

Q. The pistol in your left hand when you shoe Hanson the last time, or right hand?

A. It was in m' right hand—no; it was in my left hand, I guess, when I shot Hanson.

Q. He had hold of the pistol in your left hand, and George had hold of your right hand, and you shot Hanson and jerked the pistol with your left hand out of his hand, and then turned and shot George?

A. Yes, sir.

Q. Will you tell me how Hanson had hold of your pistol, and, standing there in three feet of you, happened to get shoet right square in the center of the back?

A. He wasn't shot in the back as I know of.

236 Q. There is some clothing here that looks like it, that looks like he was shot in the back. You didn't shoot him in the back, did you?

A. Not that I know of.

Q. If it was done the way you have stated it would have been impossible for you to do it. You didn't shoot him when he was running, did you?

A. No, sir.

Q. You didn't shoot him when his back was to you, did you?

A. No, sir; I never shot any one of them in the're backs, or shot them when the're backs was to me.

Q. You say you didn't give this scabbard to the little boy?

A. I didn't give it to him; I throwed it towards him.

Q. When you grab'ed for yo'r pistol it dropped on the ground, the scabbard?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Then you stooped down and picked it up and took the pistol out and threw the scabbard to the boy?

A. I took it up as soon as I could, and then slung it across towards him; I didn't tell him to take it or anything; I just slung it towards him.

Q. When the pistol dropped out of your pocket——

A. It never dropped out of my pocket.

Q. I thought you said it dropped out of your pocket.

A. It was the scabbard dropped on the ground.

Q. You drew the pistol and scabbard out of your pocket, and the scabbard fell on the ground?

A. Yes, sir.

Q. Did you stoop down and pick the scabbard up and throw it to him?

A. No, sir; I didn't; I was already down; I didn't have to stoop down.

237 Q. If you were in a fight, why did you stop in a fight, when you drew your pistol and threw the scabbard to the boy?

A. I did not want them boys to get hold of it.

Q. Were you afraid they would hurt you with it.

A. I was afraid they might tear it, or try to take it away from me.

Q. While you were being beaten over the head, and it became necessary for you to draw the pistol and kill somebody, you were afraid they would tear your infernal little scabbard?

A. I didn't want it torn.

Q. You threw that to Harvey?

A. I threw it towards him.

Q. I suppose you were being pretty badly hurt about that time? You would not have drawn your pistol if you were not being hurt?

A. I was in a scuffle with them.

Q. You were being hurt or you would not have drawn it?

A. Yes, sir.

Q. Did you throw the scabb'rd to him with your right hand or left hand?

A. I don't remember which one it was, now.

Q. You had the pistol in one hand, and you picked up the scabbard and threw it to the boy with the other.

A. Yes, sir.

Q. You were scuffling awful hard—both hands full?

A. Yes, sir; about as hard as a person can scuffle. One hand was not full when I picked it up and throwed it towards him.

Q. Lying on your back?

A. No, sir; on my side; I had dun been throwed down.

Q. Lying on your left side; you had the pistol with one hand——

A. I was lying on one of my sides.

Q. These boys on top of you; and you threw this scabbard to this boy?

A. I didn't see the scabbard when it first fell; I saw it after I had began the scuffle.

238 Q. That is worse than ever. You didn't see it when it first fell. How long after it first fell was it when you first saw it?

About a minute, I guess; I don't know. I didn't see it when it fell.

Q. Then, after you had drawn your pistol, and when this thing had become a death fight between you and those boys, you, with the pistol in your hand trying to shoot them, they struggling for their lives——

A. I wasn't aiming to shoot them at all.

Q. They saw it in your hands and they would have reason to believe you intended to shoot them, and you did shoot them, and while that death struggle was going on you stopped long enough while you were on the ground to pick up that scabbard and throw it to the boy, for fear it would be torn?

A. I didn't stop very long.

Q. I don't care how long you stopped. You throwed it to the boy because you was afraid it would be torn?

A. I would like to know how I could have stopped with them on me.

Q. You must have stopped or you could not have picked it up?

A. I seen it lying down by the side of me, and I just slung it away.

Q. You could not sling it without picking it up?

A. Of course I picked it up to sling it.

Q. While that fight was going on you felt called upon to shoot somebody, and it seems stran'e that you would observe that scabbard at al'?

A. I seen it down there.

Q. Then you were not having such a fight as you claim to have, if your attention was diverted from that to the scabbard?

A. I didn't do much fighting; they were doing the fighting.

Q. You were doing the shooting and they were doing the fighting?

A. Yes, sir; I didn't aim to shoot any one of them.

239 Q. You didn't?

A. No, sir.

Q. But you fired three shots, and every shot struck?
A. I was kind of scared——
Q. You fired three shots and every shot took effect?
A. Yes, sir; I fired three shots, is all I shot.
Q. One man was shot twice and the other man once?
A. That is what they say; I don't know.
Q. You hit your mark evrry time. Pretty badly scared, wasn't you? But not so badly scared that you missed your mark?
A. I was so scared I didn't know what I was doing hardly.
Q. You knew that your scabbard was laying there, and you were afraid those boys would get it and tear it, and you knew enough to pick it up and throw it to the little boy; you knew enough to draw your pistol, and you knew enough to shoot, and you knew enough to run?
(No response.)
Q After this was over with, and you run off, did you put the milk in the wagon?
A. I didn't put it in after I ran off. I put it in just as quick as this was over, and we went on to town.
Q. You didn't run up to where the wagon was? How far were you off from where this wagon was?
A. About 10 steps.
Q. Then you put the milk in the wagon and went to Coffeyville, Kansas, four miles away?
A. Yes, sir.
Q. What time of day was it when you did this shooting?
A. I guess it was along about 11 o'clock.
Q. About 11 o'clock in the forenoon?
A. Yes, sir.
Q. Then you drove to Cofeeyville, Kansas, a distance of four miles. Now, what time was it when you were arrested?
A. I think I was arrested between four and five o'clock in the evening, I guess.
240 Q. Where did you get dinner?
A. I had already had dinner. I had dinner before I started to town.
Q. Did you eat dinner about 10 o'clock?
A. I eat dinner along about 10 o'clock, I guess; somewheres near that time; because we didn't expect to get any in town, and didn't expect to be back until about dark.
Q. You didn't expect to be back until dark?
A. We didn't expect to be back home until about dark.
Q. Why didn't you turn out your horse when you got down there instead of letting him stand up there hitched?
A. Because I wanted to hurry on and get back to town.
Q. Then you did expect to get back to town before night?
A. I expected to get back to town, but I didn't expect to get to town and get back down to the farm again much before night.
Q. So you eat your dinner before you left?
A. Yes, sir.
Q. Did you and the old man eat dinner before you left?
A. Yes, sir; the old man and me and James all eat dinner.

Q. What time did you have breakfast that morning?

A. Had breakfast soon.

Q. So you eat dinner and breakfast both before this thing occurred?

A. Yes, sir.

Q. This killing occurred about 11 o'clock, and then you went 4 miles to Coffeyville, and from there you walked down the railroad 16 miles to Edna?

A. Yes, sir; 20 miles.

Q. You went from 11 o'clock to half past 4, when you were arrested—but you were there at Edna about half an hour before you were arrested, so you got to Edna about 4 o'clock?

A. Yes, sir; I guess so.

241 Q. In five hours you went 20 miles. You did some pretty tall walking, didn't you?

A. I never walked fast at all.

Q. You went slow?

A. I walked along like I always do.

Q. Just walked along slowly, is that right—you walked slowly to Edna, is that right?

A. I won't say I went slowly; I walked like I commonly walk. I didn't walk very slow, because I don't ever walk very slow.

Q. You got 20 miles away from this killing. Did you drive your horse pretty fast when you went to Coffeyville?

A. I trotted him.

Q. You didn't make him run any?

A. No, sir; I don't think I did. I trotted him pretty fast. He could trot as fast as any other horse could lope, pretty near.

Q. When you got to Coffeyville why didn't you go and see Mr. Marks about this matter, tell him what had occurred, or hunt up Mr. Morgan?

A. Because I didn't think it was worth while.

Q. They were grown persons?

A. It wasn't my business, because I done it, to go around and tell every one about it.

Q. I should think you would go and see some grown person who was your friend?

A. I didn't know that Marks was my friend.

Q. You were working for him; why didn't you go and see him?

A. Because I did not want to.

Q. Why?

A. Because I didn't want to. Because I didn't think it was my business to run around and tell everybody about it.

Q. I should think that would be the very thing you would do if you were innocent and hadn't done any wrong to go and tell somebody. Now, why didn't you tell it? It is the very thing you ought to have done. You didn't want to do it because you had killed the boy; isn't that the reason?

(No response.)

242 Q. You say you shot twice at Hanson. When you saw Mr. Clifford and Mr. Knotts, you told them you shot once, didn't you?

A. No, sir.

Q. You didn't?

A. No, sir; they never asked me how many times I shot.

Q. And that you shot twice at Erne?

A. No, sir; I didn't; I could not have shot twice at Erne, because there wasn't but four loads in the revolver, and there is one in it now, or I left it in there. I do not know whether it is in it now or not.

Q. You have already denied stating that the pistol was loaded all around, and you shot the rest out at a rabbit?

A. I didn't say it was loaded all around.

Q. You didn't say you had shot it out at rabbits from Coffeyville to Edna?

A. No, sir; I heard Mr. Knotts say that, too. I never told him anything about it. I have heard a heap said up here that I never said or that I know anything about.

Q. I suppose if you had got to Oswego, you would have told your father about this, wouldn't you?

A. Yes, sir.

Q. What were you doing at Edna a half an hour before the officers came?

A. I wasn't doing anything, but setting there on the depot platform.

Q. Waiting for the train?

A. No, sir; I wasn't waiting for nothing. I was just setting there.

Q. Was Marks paying you anything for your services?

A. He was boarding me, and whenever I would want anything he would give me the money to get it with.

Q. Mr. Clifford throwed his gun on you when he told you to come to him, did he?

A. Yes, sir; I was shot at three times.

243 Q. You had a talk with Mr. Knotts on the train?

A. No, sir.

Q. He took you on the train from Edna to Coffeyville?

A. Yes, sir.

Q. But never talked to you any?

A. Never talked to me about what had happened, as I know.

Q. Were you handcuffed?

A. No, sir; I wasn't handcuffed.

Q. I suppose you had bruises on your head where you were struck with sticks?

A. I wasn't struck on the head but once. There was a bruise where I was struck there, but it is done gone away along ago.

Q. The scratch was made by a kick that a calf gave you in there?

A. Yes, sir.

Q. Did you tell Mr. Clifford when he asked you why you shot that boy down there—did you tell him that a man up at Oswego had killed another man, and they didn't do anything with him? You heard Mr. Clifford swear to that, didn't you?

Mr. FREDERICK (counsel for defendant). That was Knotts.

The DISTRICT ATTORNEY. No; I think it was Clifford. Knotts swore that the defendant said that a man had shot him at Oswego, and they didn't do anything with him. (To the witness.) You stated to Clifford that a man had killed another man at Oswego, and they didn't do anything with him, didn't you?

A. That is something they made up their own selves; I don't know anything about it at all. I never was in any trouble before this.

Mr. FREDERICK (counsel for defendant). But the last question he asked was not in reference to yourself being in trouble; it was that you told Mr. Clifford that another man killed a man at Oswego and they didn't do anything with him for it.

The DISTRICT ATTORNEY. He denies stating it.

244 Mr. FREDERICK (counsel for defendant). His answer indicates he did not understand you.

The WITNESS. There was no man killed up there that I know of.

The DISTRICT ATTORNEY. You never told him that; that is some of his own talk?

A. I didn't tell anything only what I know.

Q. Did you make this statement to Mr. Clifford, when Mr. Clifford asked you if you didn't know you had got yourself into serious trouble; and didn't you then make this remark to him, that a man in Oswego, where you had lived before, had shot somebody and they didn't do anything to him? Did you tell him that?

A. If I told him that I have forgotten all about it; I don't think I told him that.

Q. You think that he made that up?

(No response.)

Witness excused.

Defense rests.

245 The United States then introduced the following witness, N. M. Clifford, who testified in rebuttal as follows:

246 *Testimony introduced by the Government in rebuttal.*

N. M. CLIFFORD, having been recalled upon behalf of the Government in rebuttal, was examined by the district attorney, Mr. W. H. H. Clayton, and testified as follows, to wit:

Question. I believe you have told that you are a deputy marshal for the district of Kansas?

Answer. Yes, sir.

Q. And that you assisted in the arrest of the defendant?

A. Yes, sir.

Q. I wish you would look at the paper I now hand you and tell me whether it is dated the 20th or the 26th?

A. The 21st.

Q. I will ask you if upon the 21st day of May last, 1892, you had the two Marks boys make a statement which you took down in writing?

A. I did.

Q. Where was that?

A. That was in my office in Coffeyville, Kansas.

Q. Do you remember who was present when they made their statement to you—the two Marks boys I am speaking of?

A. I do not remember positive that any one was present. If anyone, it was their father, Albert Marks.

Q. He states he was present. Now, Mr. Cliff'rd, please state how the boys came to make their statements to you?

A. I asked Mr. Marks, the father of the boys, and asked him if he had any objections if he and his little boys would give me a statement of their knowledge of the affair, and he says, "Why, certainly." He asked me when, and I says, "As soon as possible while it is fresh in their
247 minds," and I said, "I would like to have it done for my own special benefit, and in justice to both parties."

Q. Then what?

A. They came to my office on the 21st day of——

Q. Was that the same day you had this talk with him, or afterwards?

A. I don't remember that; it was about the same time.

Q. They came to your office?

A. Yes, sir.

Q. You took their statements?

A. Yes, sir.

Q. They were not sworn?

A. No, sir.

Q. You had no authority to swear them?

A. No, sir.

Q. Did you reduce their statements to writing?

A. Yes, sir.

Q. Please state if they were signed by them?

A. Yes, sir.

Q. These boys signed their names?

A. Yes, sir.

Q. Have you that writing before you?

A. Yes, sir; I have.

Q. Did you take it down verbatim as they stated it?

A. Yes, sir.

Q. Please state, if before they signed it you read it over to them?

A. I did, word for word, distinctly.

Q. Did you write it down as they made the statement?

A. Yes, sir; just as they made the statement, sentence by sentence, and in their own language.

Q. And then after that you read it over to them?

A. Yes, sir.

Q. Carefully, you say?

A. Yes, sir; every word.

Q. And then they signed it?

A. Yes, sir.

Q. Turn to the statement for the purpose of refreshing your memory—(to the court) I suppose as these boys signed it, I can use the paper itself?

The COURT. I think you had better prove it. He can have it before him and refresh his memory with it.

The DISTRICT ATTORNEY. Very well; I will prove it the other way and stop all controversy about it. (To the witness.) Turn to
248 the statement of Harvey Marks. You may open that and have it before you. State now on what day the statement was made to you—I believe you have already stated it was the 21st day of May?

A. Yes, sir; 21st day of May, 1892.

Q. In your office in Coffeyville, Kansas?
A. Yes, sir.
Q. Did you have any other talk with them except what you have stated?
A. No, sir; I did not.
Q. You offered no threats or inducements?
A. No, sir.
Q. They were made voluntarily?
A. Yes, sir.
Q. Please state what the statement of Harvey Marks was to you upon that occasion?
A. Just as it is written here.
Q. State what it was?
A. My name is Harvey Marks——
Mr. FREDERICK (counsel for defendant). I object to the witness reading that to the jury.
The COURT. He can look at it and refresh his memory.
Mr. FREDERICK (counsel for defendant). In the first place, when this examination was had there was no one there representing defendant; they were not cross-examined, and they were not under oath.
The COURT. That is very true, but they are brought here as witnesses for the defendant, and this is offered, of course, to contradict their statements as witnesses. You can offer the statements made by a witness at any other time or place if they differ from those made on the stand, for the purpose of contradiction.
The DISTRICT ATTORNEY. Go on and state what was said; you may have the paper before you?
A. He told me that on the day of the shooting, on Saturday morning, that his pa, Albert Marks, sent him to the farm with a churn in a cart after the milk; that they kept their milk out at the farm. On the
249 road to the farm, south of Coffeyville, he met his grandfather, the old gentleman, I don't know his given name, and the defendant going north to Coffeyville. Alex got out of the wagon and got into the cart and went back with him to the house to show him what milk to skim.
Q. Now refresh your memory as to the exact language. I would like to have it word for word, as near as you can give it?
A. They went to the house and skimmed the milk. As he was locking the house Alex told him these boys——
Q. Where was Alex at that time?
A. He was outside of the house.
Q. See what he went out for; refresh your memory as to that part of it, and tell me what he went out for?
Mr. FREDERICK (counsel for defendant). There is no difference in his doing that and reading from the paper itself.
The DISTRICT ATTORNEY. He is not reading from it.
Mr. FREDERICK (counsel for defense). If he attempts to testify from the paper it is the same as offering the paper itself, because things that are equal to the same thing are equal to each other.
The COURT. There is no question but what the witness has the right to have the paper before him for the purpose of refreshing his memory.

The WITNESS. He told him to lock up the house, that the Erne boys——

The DISTRICT ATTORNEY. I asked you the question where Allan was when he told him the boys were coming. You can refresh your memory from that statement. Where was Allan and how did he come to leave the house?

A. They had skimmed the milk and had left the house?

250 Q. What had Allan left the house for?

A. To return to Coffeyville with the milk.

Q. Refresh your memory from that paper and then tell me?

A. He told him not to lock the house, the Hanson boys——

Q. We understand you now that Allan had gone out for some purpose or another?

A. Yes, sir; out of the house.

Q. You are not able to tell me what he had gone out of the house for? That is the point I am trying to get at, why he had gone out and left the boy there in the house? (After a pause.) Well, it does not make any different. He went out for some purpose?

A. He had gone to the barn.

Q. Then the little boy was locking up the house, as I understand you, and he told him that these boys were coming, and not to lock up?

A. Yes, sir; because George Erne, and Willie Erne, and Phillip Hanson was coming to whip him.

Q. Now, go ahead.

A. Harvey Marks staid at the house, or in the yard, until the boys crawled through the fence, between the stable and the chicken house. Alex said, "You come over to have that battle, did you."

Q. That is what Alex said to them?

A. Yes, sir; and Phillip Hanson said, "Yes, God damn you, and we aint going back until we have it. The Hanson boy then commenced to whip Alex with the stick over the arm. Alex got the Hanson boy down——

Q. Alex got the Hanson boy down?

A. Yes, sir; and George Erne run up and commenced to whip Alex. And Alex then got loose from them and run into the house and got his pistol——

Q. Let me see if I understand you now. When Alex got the Hanson boy down George commenced to whip him, and then the defend-

251 ant got loose from him, and went to the house and got his pistol?

A. Yes, sir; he came out in the yard where they were. When he got pretty close to them he shot Phillip Hanson.

Q. That is, when Alex got pretty close to them he shot Phillip Hanson?

A. Yes, sir; then the Hanson boys started to run, and George Erne did too, and then Alex shot at George Erne.

Q. While he was running?

A. Yes, sir; two times; then the little Erne boy started off, but didn't run, and then Alex pointed his pistol at the little Erne boy, and he said, "You run, God damn you," and the little Erne boy said, "No, I am not going to do anything at all." He said this while he was walking off, but didn't stop. The Hanson boy ran out into the wheat field and fell.

Alex then came back where I had been standing at the west side of the house, and went in the house and got his grip and locked up the house, and we picked up the churn of cream and put it in the cart with his grip, and we then started to town. We drove the horse all the way to town. He said on the road home he shot the Hanson boy and shot at George Erne. Alex drove all the way to town. He said he was going home. When we got to the Missouri Pacific Railway crossing in town of Coffeyville, he got out of the cart, and said, "Good-bye, Harvey, I am going home."

Q. That was Harvey Marks's statement as made to you?

A. Yes, sir.

Q. Made under the circumstances you have stated?

A. Yes, sir; that is not all the statement made, but the most of it.

Q. Did he make any other statement?

A. No, sir; he did not.

Mr. FREDERICK (counsel for defendant). You say that is not all the statement he made. Do you mean you have not read all that is written there?

252 A. No, sir; I have not stated all that is in that paper.

The DISTRICT ATTORNEY. What is it you haven't stated? I want it all.

A. He said he had five cartridges in his pistol; I don't know how many more. I haven't seen him since. He left at depot crossing, and I went on home and told my ma and Mr. Gaines, who was boarding at my house. He didn't tell me anything about the trouble my brother Jimmie and he had with these boys. All the shooting happened on our place, close to the house. That was where the fight took place. I did not hold the scabbard, and did not have it while it was going on. He only shot one shot at the Hanson boy once, and George Erne twice, and didn't shoot any on the road to town. This is all I know about the whole affair. Signed this May 21st, 1892. Harvey Marks.

Q. He told you that he had five cartridges in his pistol. Now, then, take the statement of James Marks. I believe you stated that he made a statement under similar circumstances, and at the same time.

A. Yes, sir.

Q. He is a brother of Harvey Marks?

A. Yes, sir.

Q. He is the larger one of the two, is he not?

A. Yes, sir.

Q. You reduced his statement to writing, and you read it to him and he signed it?

A. Yes, sir.

Q. Please state what that statement was?

A. He told me that he was 14 years old; lived in Coffeyville, Kansas, and work in the Indian Territory; that he had only knew Alex Allan since he commenced to work for his father. He said he had been with him all the time for last three or four weeks. On Tuesday before the shooting Alex and himself started to hunt John Morgan's horses. They went down to Vinegar Creek, south of Mr. Erne's house, close to

253 a straw stack. They then stopped, and Alex said, "Hello; what are you doing over there?" Nothing was said, but they—Hanson,

Willie Erne, and George Erne—came over to where they were on the east side of the creek, when Alex said, "What are you doing over there?" and Phillip Hanson said, "We are killing God damned niggers;" and I asked them, "Have you seen Mr. Morgan's horses?" and Phillip Hanson said, "Yes, God damn you; we run them across the river." Then Alex asked where was the best place to cross the creek. "Right here; God damn you," said Phillip Hanson. Alex then said, "The water is too deep to cross there; you must walk on the water." Phillip said, "Yes; I can. You got too much God damn nigger blood to walk on the water." Alex then said, "You got too much God damned white blood to walk on the water." This is all that was said. I then said, "Come, Alex; let's go up here and cross the creek;" and then Alex and I started up the creek to cross, and Phillip Hanson said, "I don't allow no God nigger to walk on our place." Alex said, "'Tain't none of your place; it is John Morgan's place." Me and Alex went on, and Phillip commenced cussing because we went on up on the place further. We said nothing. We went on and caught the horses. Then these boys came up to where we were with clubs and commenced to curse us again. Alex said, "I thought you drove the horses across the river." Phillip said, "We did; God damn you to hell; have you anything to say to it?" "If you si' God damn you to hell, we can settle it pretty quick." Then Alex said, "George Erne will help you, or I could whip you myself." Then Phillip said, "Don't you say you can whip me; I can whip you so God damn quick—so God damn quick, till I wear you into a frazzle." Then Alex said "Oh no; you can't whip nobody." Phillip commenc'd to curse Aleck (not me)——

254 Q. That is not Jimmie?

A. Yes, sir; Phillip commenced to curse Alex (not me) to everything he could think of. Alex then said, "I'll settle it Sunday," and started off.

Q. Settle it Sunday?

A. Yes, sir; "and started off towards town so he could get home. Then Phillip wanted me to let him have my horse to catch Alex. I would not do that, and Phillip said, "I am going to beat hell out of you, and I'll kill you, God damn you to hell. We went then on home. After we got home, and in going to milk, Alex said: "That boy was true pluck, wasn't he; he was going to kill me." We stayed on the farm until Saturday morning and started and came to town with my grandpa, and on the road to town we met my brother Harvey going to the farm in the cart, when Alex got out and went back with brother Harvey to show him what milk to get. I came on home and did not go back again until night, after the shooting. When at the farm Alex kept his pistol in his grip. Alex said his father gave him his pistol. This is all I know about it. Alex never made any threats or said what he was going to do. When he first went to the farm he was shooting some at a mark to see how straight he could shoot, when grandpa made him put up his pistol, and said, "If you get into trouble you might use it and shoot some one," and he said, "No, I will put it up; I don't want it to rust." This is all I know. Signed this 21st day of May, 1892. James Marks.

Q. You reduced that statement made to you, to writing, and they signed it.

A. Yes, sir.

Q. I believe you say you read it over to them afterwards, and explained it to them?

A. Yes, sir; the boys were not together when they made the statements.

Cross-examination waived; witness excused.

Testimony closed.

255 The court then charged the jury as to the law of the case, as follows:

256 In the circuit court of the United States, within and for the western district of Arkansas. February term, 1893.

UNITED STATES
vs.
ALEXANDER ALLAN. } Murder.

Charge of the court, delivered Feb. 13, 1893, 5 *o'clock P. M.*

PARKER, J. Gentlemen, the defendant stands before you charged with the crime of murder, because, as is alleged by the Government, he, on the 14th day of May, 1892, at the Cherokee Nation, took the life of Phillip Hanson by shooting him with a gun or a pistol, and that he did this act willfully and with malice aforethought. That, in substance and in effect, is the charge against the defendant. Now, it becomes necessary for you to consider first what two elements there are entering into this proposition which you are called upon to solve. Every verdict of a jury is made up of the truth as they find it, and they get that from the evidence and the principle of the law that is applicable to that truth. These crimes, which are prescribed as such by the law, are all defined so we can make no mistake about them; so we can take the definition given by the law and

257 know exactly what is necessary to be found. Now, you first ascertain what is found, and then you go to the law as given by the court, to see what is necessary to be found to make the crime charged. Then you revert to the evidence again to see whether it is found, and if it is found to the degree of certainty prescribed by the law there has been a crime committed. Now let us see, under the law, what we are to find in this case to ascertain the existence of the crime of murder. First, we must find that Phillip Hanson, the young man who is alleged to have been killed, is dead. That is the very first thing. We can make our work easier by reverting to the evidence as we go along to see whether these propositions are true or not. If they are, we will put them aside in our minds, as established, and in that way we narrow the scope of our investigation so as to bring it down to as few controverted points as possible. There is no controversy over that fact that he is dead, and if it was controverted it is a fact proven beyond controversy. However, in this case it is not denied by the defendant. It is admitted by him in effect. We may, therefore, lay it aside as a proposition established in this case. Now, the second thing we must find is that he died because he was shot with a gun or pistol. The indictment says that he was shot with a gun, but, legally speaking, that means either a gun or a pistol, because, in the law, they are kindred weapons. The proof in this case is that there was used what we commonly call a pistol, and

that Phillip Hanson died because he was shot with that pistol. That, of course, is a fact to be found only by inference. You take the fact that he was in health at the time that he was shot, if he was shot, and that he died shortly thereafter. If he received wounds that might naturally, according to our best belief and judgment, produce death, you may take facts
258 of that kind as facts sufficiently strong to establish the fact that the cause of his death was the shooting. That is a fact that is not in controversy here; the evidence puts it beyond question, beyond controversy; it so establishes it that you may lay it aside as a proposition necessary to be proven in the case, that is established by the evidence. Next, it is necessary to find that the shooting was the act of the defendant—that is, that he did the shooting. Now, there is no controversy on that proposition. It is one necessary to be found. When we have found these propositions we have found that Phillip Hanson was killed by the defendant. That proposition last given is involved in the three that I named before, viz: that he is dead, that he died because of being shot, and that this act of the shooting was the act of the defendant. So far, then, we have gotten in the case without there being any controversy about the conclusive character of these propositions that enter into it. But we take a step further, and we are then required to look at the manner of this killing that we may the better be able to characterise it; that is, to see first whether it is a crime, and if so, what the character of that crime is. Now, we are to bear in mind that under the law of the United States there are but three conditions which can spring out of a homicide under this law. Every case of the killing of a human being belongs to one or the other of these conditions—that is, every such killing is either murder, or manslaughter, or it is no crime, because done in such a way and under such circumstances as that under the law it may be so denominated as that no crime is attached to it, because the law gives a right to do it. I repeat, that in every case where a human life has been taken, the char-
259 acterisation of that act must belong to either one or the other of these three conditions that I have named; that is, it is either murder, or manslaughter, or it is no crime at all.

The Government, in its accusation called the indictment, and by its officer, the district attorney, claims that this killing was so done as that he did it, whoever committed it, in such a way as that it is murder. The defendant claims that although he did the killing, it was so done under the law that he had a right to do it; that if this is not true the killing was so done as that it was not murder, but a crime of less magnitude, called manslaughter. This state of case makes it necessary that you should find, first, if a crime has been committed, and then you should find the nature of the crime, and then who committed that crime. It follows in this case that if a crime has been committed the defendant committed it, because the defendant has confessedly admitted that he is the author of the death of Phillip Hanson, and if the production of that death is a crime he is confessedly, or proven by the evidence, to be the author of that crime. There are, then, two duties resting upon you which you must discharge: First, to find if a crime has been committed—and that is a solemn and imperative duty; and secondly, a duty of equal magnitude, one that is equally high, is to properly characterise this crime, to properly name it, because you can not, in the discharge of the functions pertaining to your office,

enter into a compromise with crime so as to make it of less grade than it is, or that you from any wanton prejudice or feeling should make it of higher grade than it is, but your solemn and imperative duty is to find, first, if a crime exists, and then to correctly and fully name the character
260 of that crime, whatever it may be. Whenever you have done that your duty is done, and the responsibilities and duties in the case then attach to other persons, and not to you. I say, then, that this state of case makes it necessary that I should give you the legal definition of all these conditions that I have named—that is, murder, manslaughter, and a rightful killing under the law of self-defense, called a killing in self-defense. First, then, we will inquire what it takes in legal contemplation to make a killing murder. These propositions that I have named must exist—that is, the party must be proven to be dead, and he must have been killed by the means named in the indictment, and then that this killing must have been done, as far as the given case on trial is concerned, by the particular party named, by the defendant; and then that the killing must have been done willfully, and done with malice aforethought. Now, these expressions are the ones that make up the crime of murder; they go to tell us what is meant by murder. The killing must be done willfully. That is the first requisite. Then it must be done in such a way that under the law it is regarded as a killing done with malice aforethought. These expressions have attached to them a legal meaning. It therefore becomes necessary to give you the legal definition of these expressions, to tell you how the law regards them, to tell you the meaning that the law attaches to them, and I can do that better by reading the definition as given in another case here, a case tried in this court which is printed, in which I told the jury that "the word willful, as used in connection with the charge of murder, such as is preferred in this in-
261 dictment against this defendant, means an intentional killing, and not an accidental killing. It means an act which results in death that is intentionally done, and one that is not accidentally done. Now, there is a great difference in the law between that which is accidental and that which is intentional. The law fastens intent to every act that is not an accident. Every act that produces death that is outside of the definition of the word "accident" is intentional in the law, whether it grows out of a specific design to take life, or whether it grows out of gross carelessness, or whether it arises from a condition of mind that prompts the possessor of that mind to be engaged in some other wrongful or criminal act, and in the execution of it a life is taken, provided it is a wrongful or criminal act, which from its nature and the way it is executed as a natural and probable and reasonable result death may ensue from the execution of the unlawful or criminal act. That which is an accident in the law is something which occurs after the exercise of the care which the law requires to be exercised to prevent its occurrence."

Now, in connection with the handling or use of firearms, a man is required to exercise the highest possible care that he can exercise under the circumstances. If he does that, and a death ensues from the handling or use of firearms after that care is exercised, there is no crime attached to it, because that is an accident—something which occurs after the exercise of the amount of care exacted by the law to prevent its occurrence. I say, as I have already told you, that everything in the law that occurs

outside of that that is a product of every other condition except that which is an accidental condition the law attaches intent to it. There is no
262 trouble in finding intent when you have a case where proof shows that a man presents a deadly weapon at another and pulls the trigger and fires it at him, and he falls dead, by your common observation, if you would see an act of that kind you would conclude that he who did the act intended to kill—that is, he intentionally was doing an act which naturally or probably might kill, and which did kill, and whenever a man does an act of that kind in that way the law says that he does an intentional act, and if he does an intentional act he does a willful act, because intentional, in this connection, means willful. Now, if that act was one which would not naturally or reasonably produce death, which would not as a consequence endanger life, you could not say that he intended the result; but if the connection between the act and the result is an intimate connection—that is, it is one that usually or probably or reasonably follows from an act of that kind, you are authorized by the rules of logic and law to say, from the doing of the willful act, that he intended a willful result, that the result was willful. If the act was willful the result was willful, because the law holds every man to have intended the necessary, natural, or probable results of his acts. If I draw a pistol or a gun upon one of you gentlemen and fire it at you, and you are killed by it, the law does not permit me to say I did not intend to kill you. It says to me that it claims the existence of intent as growing out of that act. I am a person sufficiently rational, sufficiently sane, having sufficiently the powers of observation to have taught me that an act of that kind usually does produce death, and the only inquiry, when you are called upon to find whether a result of that kind was willful, that you are required to make is to find whether the act was willfully
263 done; and if so, it was an act of that character. Now, then, I say there is no trouble in finding whether the act was willfully done when a weapon of a deadly character is used, when a weapon is used which is made for the purpose of taking life, because that is the object of its construction, and that object is presumably known to those who handle weapons of that character in that way. There is, therefore, no trouble in finding whether the act was willful with that definition before us. The law says, "When a man exercises the amount of legal care exacted by the law, and something occurs beyond that, that is not his willful act. The law recognizes that he does not do it willfully. But when he does an act which naturally or reasonably or probably, from its nature and the way it is done, produces a certain result, that is held to be an intentional result, because the act as done in that way is intentional; and whenever the act is done, and it is an act that may naturally or probably produce a certain result, whenever the act is done intentionally the result is intentional. For example, if a man presents a gun at another and fires it at him, the fact of drawing the gun and presenting it shows that he wills what he does; shows that that act is a willful act upon his part. And when that state of facts exists the act of presenting and firing the gun is recognized by common observation and common experience as a willful act. If that act produces death, because there is a known connection between the act and the result which is probable, which is usual, and which is reasonable, the party is said to have intended the result, and consequently to have willed the

result. Now, intent is something that can be found only by inference." That is, you can not see it; you can not taste it; you can not
264 touch it; you can not smell it; you can not hear it; you can not test the existence of it by the application in a positive way of any one of the five senses. You must learn it some other way, for it is necessary to be found. The law points out a method by which it may be found, and a method that determines it with equal certainty that you could learn it by applying one of the five senses to it, if that were possible. "It can only be found by the circumstances in the case, by the nature of the act done and the way it was done, and the character of the weapon used, bearing in mind that the law holds every man to know the nature of the weapon that he uses, the purposes for which it is constructed, and the results that naturally and reasonably are produced by it. That is recognized by the law as a matter of common knowledge within the mind of every man who has arrived at the years of discretion. For that reason when a man presents a gun or a pistol at another and shoots it at him, the law says he intends to kill him, because the killing is a result that is natural or probable or reasonable.

"So in a case of that kind, when you are called upon to find whether he intends to kill or not, you find, first, whether he presented the deadly weapon in shooting distance of him and fired it at him, whether that was a willful act, and when you find that (as I have told you) from the character of the weapon used and the manner of its use, because the weapon can not use itself, it can not present itself, it can not pull its own trigger, it can not of its own accord or of its own will power, because it has none, send the deadly missile in the body of the man who is killed; there is an intelligent will power that does all that. I say, when you find a gun or a pistol has been held in that attitude, and that it has produced a deadly result, as reasonable men, as men of common knowledge, of common
265 observation, you must come to the conclusion that the party willfully did that act, and when he willfully does an act of that kind he willfully produces the result. A word in this connection as to how you may find how the act was willfully done:

"The presumption that the law recognizes is that a man is held to have intended the natural and ordinary consequences of his acts. Every sane man, who is a voluntary agent, acting upon motive, must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own acts. If one voluntarily or willfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is that he intended so to destroy such person's life. So, if the direct tendency of a willful act is to do another some bodily harm, and death, in fact, follows as a probable consequence of the act, it is presumed that he intended such consequence, and he must stand legally responsible for it. So, where a dangerous and deadly weapon is used with violence upon the person of another, as this has a tendency to destroy life, or to do some great bodily harm to the person assailed, the intention to take life or to do him some great bodily harm is a necessary conclusion from the act." It is a conclusion that you, as reasonable men, must find from that proven state of facts. Therefore, there need not be any trouble, in my judgment, in finding when an act is willfully done with this explanation of what is meant by being willfully done and by this method pointed out by the law of finding the existence of that condition.

We now come to the phrase "malice aforethought," and I say to you, before proceeding to define that expression, that if you can elimi-
266 nate from the case that is pending before you the other two conditions that I have named, to wit, that it was not manslaughter, and not a case of self-defense, as I will define these conditions to you presently, you must necessarily find that the only condition existing in the case under the law is that of murder, because there are three of these conditions growing out of the taking of human life, as I have told you, and because, again, when a man willfully takes a human life without just cause or legal provocation, so as to make it a case of self-defense, or without such legal provocation as to reduce the grade of the crime from this higher crime known as murder to manslaughter, it is necessarily murder, if it is done willfully, because a condition of willfulness producing a death without just cause or excuse or legal provocation without reducing or justifying the crime is a case where malice aforethought exists, as you will learn presently.

I apprehend that we now have a perfect understanding of this expression; that the act was done willfully, and that we can, without any trouble, determine in this case whether that element of the crime exists or not. You will bear in mind that this element of willful/ness is not a distinguishing characteristic of murder; it is not a distinguishing trait of that kind; it is a characteristic which is possessed in common with murder, with voluntary manslaughter, and a case of self-defense, that the act was willfully done. When a man kills another in self-defense he who does it kills the other as a willful act. The very fact that he does it in self-defense contemplates that he wills to do it. If a man kills another in a case where it is voluntary manslaughter, he does it willfully; but while this characteristic is one that is common to these three conditions, we have another
267 characteristic that distinguishes murder from any other homicide, known as "malice aforethought." We then come next to that phrase, and we will see what it means, and see how we may find its existence; because it is something which originates from the mind of the party doing the act, we must find some way or another of getting at the condition of the mind that is doing that act. If we can not fathom it; if we can not penetrate its inmost recesses to see what is going on there, we must adopt some other means that are reasonable, some other process that is rational, to get at the mental condition of the party, because both of these characteristics of murder spring from the condition of the mind of the party. The law says we may do it by circumstances." We must do it that way; we can not do it any other way. Positive evidence, you will remember, is evidence of the very thing itself. You want to prove, for example, that A shot at B; C comes in and swears that he saw A shoot at B. That is positive evidence of that fact; it is the fact itself. But suppose that C nor anybody else saw A shoot at B, yet there are enough facts to lead us to believe he did it and we start an inquiry, and it is necessary to prove that fact, how are you going to show it? You have to look at the circumstances; you have to look to those things that stand around that shooting; those things that are left in connection with that occurrence, as there are things left in connection with every occurrence in life. A man can not perform an act, he can not do an act, and especially a criminal act that is outside of the law, without leaving some circumstances in connection with that act. Now, we are to look to these things that are left standing around, and, above all, in a

case like this, as I will tell you more fully after awhile when
268 we come to refer to the evidence in the case, when there is a conflict of the statements of the witnesses as to how the affair occurred, we must see what the facts in the shape of circumstances were to see what the nature of that occurrence was in order that we may find out who, when they make the positive statements, are telling the truth about it. Now, then, this characteristic of the mind, this thing which generates an act, this distinguishing trait, has a mental existence only, and we can only, therefore, get at it by the light of circumstances, by the light of things that surround the transaction in the shape of things that characterise the doing of the act, the way it was done, the character of the weapon used, the manner of its use, the circumstances under which it was used. These things are all to be taken into account to enable us to properly name the act as done. The law says, therefore: "We may do it by reason of the character of the act done, the manner in which it was done, and we may solve the condition of the mind by the light of the facts and circumstances that surround the act going to characterize it, to show what manner of act it is, bringing to bear upon the condition of facts of that kind the observation of men of mature judgment, of men of intelligence, of men who, because of the amount of information they possess, are to the greatest extent qualified to discharge the great responsibilities and duties involving upon them as jurors. As I have remarked to you before, when malice aforethought exists murder exists. Now, let us see what is meant by that; let us get an understanding of it if we can; let us comprehend it fully, that you may make a proper application of it to the facts in this case.

"It is defined by the law in a general way to be the doing of
269 a wrongful act without just cause or excuse in such a way and under such circumstances as to show that it was done wrongfully, and that it was done in the absence of that which would give the party the right to defend against it, or that it was done in the absence of mitigating circumstances. And it is defined again as the doing of a wrongful act, without just cause or excuse, and in such a way as to show that he who did it had a heart void of social duty and a mind fatally bent upon mischief. Let us see how the law defines it and then again how the law tells us it may be found to exist. It can only be found by circumstances, because malice aforethought, like willfully, is something which exists in the mind that is necessary to be found to make up the elements of the case, and as you can not get into the mind to know what is going on there (and you could not tell what was transpiring there if you could get into it), you must learn it in some other way; and there must be some rational way by which you may learn it, some way that rational men would adopt, because you are not authorized to adopt any other method than that which is reasonable in arriving at conclusions. It is from the nature of the transaction, the nature of what takes place, the character of the thing done, and all the surrounding facts and circumstances that you are authorized to take into consideration to see what was the nature of the thing done, whether it was an innocent act or a criminal act; and, if a criminal act, what was the nature of that criminal act? "Malice aforethought is the grand criterion which distinguishes murder from other homicide, and it is not so properly spite or malevolence to the deceased in particular as any evil de-

sign in general." A man has a general evil design, sometimes called
270 general malevolence, so he is reckless of human life, so he will destroy human life without just cause, or in the absence of mitigating facts or legal provocation, it does not make any difference if he has not particular spite against the party killed, but if you can find that he has spite, no matter whether it is proportionate or not, you can consider it as an item of evidence. To show you what is meant by that proposition I give you this illustration:

Suppose you see A shoot and kill B; A is an entire stranger to B; he never saw him before, and he could not have any special spite against him, because the relation that the men bore to each other would not permit it; their lack of acquaintance with each other; the lack of opportunity for the creation of any such a state of case as to create a foundation for special spite or grudge or ill will; it could not exist. Yet could it be said that he was not guilty of murder in a case like that, when he shot B without any provocation, in the absence of anything that would justify the act, or mitigate it? Certainly not; the whole civilized world would declare it to be a case of murder, because it is a case where he had general malevolence, where he had general ill will, where he did not have in his heart that feeling which would prompt him to protect human life, but, on the contrary, that he was so created, and corrupted by that malice and malevolence against his fellow-men to such an extent that he was reckless whether life existed or whether it was destroyed, and in a case of that kind you have murder because you have malice aforethought—the doing of a wrongful act without just cause or excuse, and in the absence of legal provocation. This state of case fits the definition exactly. I continue to read from the
271 law: "The dictate of a wicked, depraved, and malignant heart; a purpose to do a wicked act; and it may be either expressed or implied in law. Express malice is when one with a sedate, deliberate mind, and formed design, doth kill another, which formed design is evidenced by external circumstances discovering that inward intention, as lying in wait, antecedent menaces, or former grudges, and concerted schemes to do him some bodily harm. So in many cases, when no malice is expressed, the law will imply it, as when a man willfully poisons another." Or, I will add, when he willfully shoots another; when he willfully and deliberately kills him without any provocation, or in the absence of that state of case which would give him the right to kill him. or give him the right to claim that his act was simply manslaughter; and you will learn these conditions presently when I come to define them, but if, according to the evidence, they do not exist in the case, as a natural consequence the other state of case must exist, the state of case known as murder. "In such a deliberate act the law presumes malice, though no particular enmity can be proved; and if a man kills another suddenly, without any or without considerable provocation, the law implies malice, for no person, except of abandoned heart, would be guilty of such an act upon a slight or upon no apparent cause.

"Malice is an intention to do bodily harm; a formed design to do mischief. It has also been defined as a deliberate intent to kill." How can you find a deliberate intent to kill? Do you have to look to see whether a man had that intent in his mind for a year, a month, a day, or an hour?

Not at all; for in this age of improved weapons, where a gun can
273 be discharged in the twinkling of an eye, if you see a man draw one of these weapons and fire it, and the man at whom he presents it falls dead, you have a deliberate intent to kill as manifested by the way he did that act; you find it there for a deliberate intent to kill existed, though it may spring up on the spur of the moment, as it were, spring up cotemporaneous with the doing of it, by the shooting of the man. If the act was one he could not do under the law and then claim it was manslaughter, or an act that he could not do in self-defense from the fact that it was done without just cause or excuse, you have a right to infer, and it is your duty to infer, it was done with malice aforethought, because it is a wrongful act producing death done without just cause or excuse, or in the absence of mitigating facts. "It does not necessarily import any especial malevolence toward the individual slain, but also includes the case of a generally depraved, wicked, and malicious spirit; a heart regardless of social duty, and a mind deliberately bent on mischief. It imports premeditation.

"Malice is an intent of the mind and heart; the doing of a wrongful act without just cause or excuse, or in the absence of that which justifies the act, or which reduces the grade of the crime. Whenever a wrongful act is done without just cause or excuse, or in the absence of mitigating circumstances, which produces death, it is murder, whether it grows out of special spite or animosity, or a specific design to take life, or the purpose to do some other act of a wicked and malignant and criminal nature, which, because of its nature and the way it is done, a human life is taken, malice aforethought exists, because that is the doing of a wrongful act
274 without just cause which results in death. It evinces a formed design to do such mischief as may deprive a fellow-being of life.

"Malice is an intent of the mind and heart. There is never presented to a jury direct evidence of what was the intent of the man's heart at the time.

"You can not tell the condition of the mind by direct proof, bearing in mind the distinction between these two kinds of evidence, positive or direct proof and circumstantial evidence. Positive proof is the proof which shows the existence of the very thing itself that you are hunting for." * * *

"Circumstantial evidence is proof that may be equally cogent and equally powerful proof of the existence of the thing, but it is not the thing itself, but is that which shows the existence in the shape of the surrounding facts and circumstances in the shape of that which attends every transaction in life; which goes to characterise it one way or the other; which goes to show either that it was a criminal act, a criminal transaction, or that it was a transaction that was honest and upright and void of crime."

You are called upon to pass upon the transaction, to see whether it was honest or not, whether it was in violation of law. You take that transaction itself, you square it by the aid of your judgment, by the light of your experience and your observation in life, by that which you know to be right and that which you know to be wrong, and you determine in that way, by these circumstances, which go to make up the transaction as to what the character of that transaction was. I give you the definition of this highest crime known as murder; you are to ascertain whether it exists

by the light of the circumstances surrounding it, and which go to
275 characterise it, or enable you to tell whether or not it was a wrongful act which resulted in death wrongfully done without just cause or excuse or legal provocation that would create a case of self-defense, or done in such a way as to make it a case of manslaughter.

Now, with reference to the ingredient of murder known as malice aforethought, it may be remarked, as I remarked before in regard to this matter that enters into the ingredient known as willfulness, that the jury never can possess direct evidence of the existence of malice aforethought, because it can never possess direct evidence of what was the intent of the man's heart at the time. "He is the only possible and direct witness to that, and if he meant so to testify he would plead guilty. The existence or nonexistence of malice is an inference to be drawn by the jury from all the facts in the case. The emotions of the heart, the processes of the mind, are to us, or to anyone outside of the individual, exhibited by the acts which the individual performs, and you are entitled to infer what his intent was, what were the processes of his mind, and the feelings of his heart, by a careful study of the acts which he performs, and all the other external indications which he may have given of what his state of mind and heart was. As an eminent text-writer has put it, there is no case of malicious homicide in which malice is not inferred from attendant circumstances; no case in which it is demonstrated as express." It can not be demonstrated by positive evidence. Sometimes we have people who are not willing to find facts on circumstantial evidence. The fact is, that most of such people do not know what circumstantial evidence means in the law.

They do not know that a man does not live an hour without
276 coming to conclusions upon circumstantial evidence upon everything.

Now, positive evidence of the existence of a God must come from somebody who saw Him; who talked with Him; who stood face to face with Him. Have you ever seen anybody of that kind? And because you have not, do you not believe in the existence of this mighty power that rules the destinies of this earth? You know it by the circumstances that surround you on every hand, the existence of every blade of grass, and the origin of that blade of grass—the invisible origin; we know not the process which governs it in its origin. The very variety in nature showing there are no two leaves on the tree alike; that there are no two human faces, no two human forms in all we know that are alike—I say this very variety, which is beyond human agency, beyond human power, and beyond any power except that invisible and Great Power that rules us all, shows the existence of this mighty being called our Maker; the creation of this planet, the fact that all the myriads and myriads of millions of planets that are in space move in their orbits, and they are put just exactly where they belong, so that this system of balances, by means of these two mighty forces, centrifugal and centripetal, without approaching on each other, occupying their position in their places, proves conclusively the existence of this creative power that made these worlds. Man can not make them; then there is some power higher than man. All mankind, from the lowest order of savageism to the highest order of civilization, believe in the existence of a Supreme Power in some shape or another; and yet all these hundreds of millions of people come to this most important con-

clusion upon this greatest of all topics from circumstances alone, and they can not do so in any other way. We believe almost every fact
277 that affects our lives by the light of such testimony. And then is it not safe for us to rely upon evidence of a like character when we are in the jury box to determine these matters that are brought before us? We must rely upon it when we are finding facts, when we are finding the truth. The law commands us to rely upon it, and at the same time the law does not say to us that we are commanded to do anything that is impossible for us to do. It is not an impossibility, because the circumstances are illuminating in their power. They illuminate a proposition with that same clearness that positive evidence illuminates it. In fact, when you have a number of things concurring that are proven to be true, all leading to the same conclusion, you can rely upon a conclusion based upon evidence of that character with the certainty that you can rely upon a conclusion depending upon positive statements, because a witness may be mistaken in his positive statements, and he may commit perjury, but these circumstances, if they come before you properly, are inanimate; you can not bring motive upon them that will swerve them to the right or left, because they are inanimate, yet they speak with powerful tongue, going to illustrate an occurrence, to show whether a man, if he has killed another, killed him in such a way as that he has committed a crime, or killed him in such a way as that the act is one that he had a right to do, and we can take them and have the transaction so illuminated by them that there is never any trouble in coming to a correct conclusion. The law again says:

"We have no power to ascertain the certain condition of a man's heart. The best we can do is to infer more or less satisfactorily his intent
278 from his acts. Now, a person is presumed to intend what he does. A man who performs an act which he knows will produce a particular result, is from our common experience presumed to have anticipated that result, and to have intended it. Therefore, we have a right to say, and the law says, that when a homicide is committed by weapons indicating design, then it is not necessary to prove that such design existed at any definite period before the fatal blow. From the very fact of a blow being struck we have a right to infer as a presumption of fact that the blow was intended prior to the striking, although at a period of time inappreciably distant, and thus we frequently find the statement laid down in reported cases, and by text-writers, that malice is to be inferred from the use of a deadly weapon."

It used to be the declaration of the law, given without any explanation to juries, that the proof of the killing was proof of murder; that is to say, if you proved a murder you proved a case of malice aforethought, a killing with malice aforethought. It is safer to qualify or explain that. It practically is a correct proposition of the law, when you consider that you can not have a killing, the proof of a killing, without there being the proof of the means used to do it and how it was done; or, if that is absent, you have another state of facts which show malice aforethought without the means used. For instance, if a man kills another without just cause or excuse in the law, and it is not a case where he would have a right to kill under the law, or a state of case which the law says is manslaughter, if you are required to find a case of that kind, and the evidence

eliminates these two conditions I have named, you have from the proof showing the killing the means used to produce that result. For instant, here you are hunting to find whether Phillip Hanson was
279 killed, the man who was alleged to have been killed in this indictment; the very evidence which shows that he was killed shows how he was killed, shows that he was shot to death, and if the fact that he was shot to death has been established in that way, if there is nothing else, nothing under the law which goes to justify or mitigate it, from the fact of the killing alone you have malice aforethought.

Now, take another case, it sometimes happens, and it has happened in this country, it happened in one very prominent case in this country when a man of eminence in his profession, that of surgeon in a medical institution in Boston, killed a man who occupied a like position with him, but he destroyed the body, put it in the laboratory furnace that they used for getting rid of the bones of people that they carved up in the interest of science. He put it in that furnace and burned it up and you could not tell by any marks of violence whether the man had been killed by a gunshot or by stabbing with a knife, or how he met his death; whether he was hit with a dry pice of grape vine and killed in that way (as it afterwards turned out), or how it was. You didn't in that case have the means used to produce the deadly result, but you had, however, evidence equally powerful showing malice aforethought upon the part of somebody; you had evidence that was not in harmony with the theory of innocence, and that was the destruction of the body, the concealment of it, because innocent men do not act that way as a rule, and there was evidence that might be taken into account to show the existence of this characterising trait of murder known as malice aforethought. Then the proof which showed the di'position of the body in that way, and that the
280 man was killed and the body disposed of, was the very evidence which showed malice aforethought. Therefore, it is true, when you come to understand it, as illustrated, that the proof of the killing shows malice aforethought, if there is no other evidence offered in the case to explain the killing, to show that it was justifiable or mitigated. Now, then, if the case on trial, when you have proof of killing by means of shooting the man to death, after I have defined these other conditions, and if you should find that neither one of them belong to this case, you necessarily find a condition where there has been the doing of a wrongful act which produced death without just cause or excuse, and done in such a way as to show that he who did it had a heart void of social duty and a mind fatally bent on mischief, and that is malice aforethought in the law. Then again:

"Malice is to be inferred from the attendant circumstances surrounding the transaction, and the jury have a right, and it is their duty to look at these attendant circumstances to see what character of act it was, to see what was the condition of the mind of the party or parties who engaged in that act, as being the only way that they can arrive at the conclusion as to whether it was an act accompanied with malice aforethought, or the converse of that, in which there was an absence of that element of the crime of murder.

"Now, anything that shows deliberation, anything that shows a premeditated purpose to do a wicked or willful act that might result in death,

is evidence that may be considered by the jury as evidence of malice, and of the existence of malice aforethought. For instance, the law lays it down as a principle if premeditation is shown, if the purpose to
281 kill directly existed in the mind of the party who killed, at the time of the killing, or previous thereto, and the killing took place in consequence of the existence of such a purpose, and it was not a killing that was excused or mitigated under the law, then the law lays it down that it is the duty of the jury to find the existence of malice aforethought from the wrongful act as done in that way. Now, the law says that this premeditation, this deliberation that exists when a man kills another, may be evidenced, and is evidenced by the deliberate selection and use of a deadly weapon that shows premeditation; it shows that the act was thought of beforehand, and whenever a party enters upon whatever unlawful or criminal enterprise he may enter upon, prepares himself with a deadly weapon for the purpose of using it in a wicked and unlawful way, and in consequence of such previous or premeditated or contemplated purpose to take life a life is taken, there being an absence from the case of that which would give the party a right to take life, and an absence of that condition which would mitigate the offense, you necessarily have a case where it is murder."

I have now undertaken to define both of these characteristics of the crime of murder, and to tell you in a brief way how you may find their existence. We now come to the definition of the crime of manslaughter. That is defined by the statute of the United States, and it is the only crime that destroys human life that is defined by the statute. The definition of murder I have given you was taken as existing in the year 1789, when this statute punishing the commission of murder was passed; it is what is called the common law definition of murder. This statute defining the crime
282 of manslaughter was not passed until long afterward, in 1857, but it defines it precisely as the common law defined it which was in existence at the time and before the time of the foundation of this Government. Listen to the definition of manslaughter:

"Every person who unlawfully and willfully, but without malice, strikes, stabs, wounds, or shoots at or otherwise injures another, of which striking, stabbing, wounding, shooting, or other injury such other dies, either on land or sea, within or without the United States, is guilty of the crime of manslaughter." Whoever kills another by any of these means, by shooting, stabbing, or any other deadly means, and he does it willfully—that is, as I have defined willfully in connection with the crime of murder, the definitions in each instance being the same—that his intention is evidenced by the fact of presenting a pistol at another and firing it at him, it is an intentional act; if it is not an accidental one, if it is one that does not come under the head of accidents it is intentional; there is a specific intention behind an act of that kind, a specific purpose of the man to do an act of that kind. Now, if he does that act, and he does it under such circumstances, and in the absence of such facts as creates the existence or shows the existence of malice aforethought, it is manslaughter—the killing of a man unlawfully and willfully, but without malice aforethought. That must be excluded from it—that is, the doing of a wrongful act without just cause or excuse in such a way as to show a heart void of social duty and a mind fatally bent on mischief—if that is all driven out

of the case, then if it is a crime at all it must come under this statute, it must come under this law defining manslaughter. The common law
283 which I will read to you, defines it in the same way, substantially, and tells you in a little broader terms what kind of conditions it springs out of. Speaking of voluntary manslaughter, it says: "Voluntary manslaughter is manslaughter that is willfully produced." It says, "Where, upon sudden quarrel." It is the willful and unlawful killing of another without malice on sudden quarrel, or in the heat of passion. "Where, upon sudden quarrel, two persons fight, and one of them kills the other, this is voluntary manslaughter. So, if they on such occasion go and fight in a field, for this is one continued act of passion, if a man be greatly provoked by any gross indignity and immediately kills his aggressor, it is voluntary manslaughter and not excuseable homicide." Let us see what is meant by that: The party who is killed at the time of the killing, must offer some provocation to produce a certain condition of mind. What is the character of that provocation? Well, he can not produce it by mere words, because mere words alone do not excuse even a simple assault. Any words offered at the time do not reduce the grade of the killing from murder to manslaughter, but he must be doing some act which, at that time, is of a character that would so inflame the mind of the party who does the killing as that the law contemplates he does not act deliberately but his mind is in a state of passion, in a heated condition, where he is incapable of deliberating. If two men are engaged in what is called a fist and skull fight, and they are engaged in assaulting each other in that way, if, in the heat of that combat, one of them, without previous preparation, without having purposely contemplated the use of a deadly weapon, suddenly uses some deadly means upon that other and takes his life, although it may be a deadly weapon
284 if there was no previous purpose to use it, the law, out of commisseration of the man's unfortunate condition, contemplating that condition, and that he is in a state of passion at the time, commisserates him so far as to reduce the grade of the crime in order that the punishment may be reduced. That is the condition, then, where manslaughter exists. It exists, provided the act is done under the influence of that condition. Now, a condition that may be created before that time, where a party has time to contemplate, as, for example in this case, if these parties had words, if they were quarreling before that time, a day or two before, the use of words one to the other would not justify even a simple assault upon the day of this killing, or at the time even, of one upon the other. Acts of that kind can not be used to reduce the grade of the crime. And if because of these words that were used the defendant went and armed himself with a deadly weapon, and he took the life of Hanson because of the use of these words, that is evidence of deliberation, and that is evidence, consequently, of premeditation, and therefore of malice aforethought. It is not evidence of a state of case that would either mitigate a killing or would justify it, but it is the evidence of the existence of a motive for this killing. Now, you do not have to have motive to show malice aforethought. The law does not contemplate that, because in the case I have already put before you where one of you might unfortunately witness the death of a fellow being—you see A shoot at B; B is unarmed and was harmless and was shot to death while in that condition by A; would you have to stop to

hunt for motive? Would you stop to inquire why it was that A killed B before you concluded that he murdered B? Not at all. Nor does
285 the law, because in a case of that kind you have the doing of a wil'ful, apparently premeditated, act, and a deliberate act, without just cause or excuse, and you consequently have a state of case where there is malice aforethought. Whenever you have the deliberate selection and use of a deadly weapon like a pistol in such a way as to produce death you have a case of malice aforethought, although you have not a word to prove the existence of motive for the act. If you can find motive, although it may not be commensurate, although it may not be in proportion to the act, you have a right to take it into consideration, but because you can not find any motive that is commensurate or proportionate to an act the killing may still be defined by the law as a willful, wicked murder. There is no motive that can exist in the human mind that is sufficiently powerful in the judgment of a right-thinking and to excuse another for willfully, wantonally, and wickedly taking a human life. Therefore, the law does not contemplate you can find adequate motives for crimes. Sometimes we say, when someone has committed a crime, that he must be crazy, because we can not find a motive for his doing the act. Men are to some extent insane when they commit deliberate murder, because if they would set down and reason about the consequences they would not do it. Men are therefore to an extent beside themselves when they do these wicked acts. We can never find motives which in our judgment are commensurate or proportionate to the crime. Here is what the law says about it:

"It is sometimes argued," says Mr. Wharton on homicide, "is it likely that one man should kill another for so small an article? Are we not to infer, when there is a homicide which is followed by the stealing of
286 a mere trifle, that the homicide was the result of sudden passion rather than lucri causa? Or for a mere prejudice or spite is it likely that one man will assassinate another, and thus expose himself to the gallows? No doubt, when a tender mother kills a child, or a friend a friend, and nothing more than the fact of killing is proved, he may be led to infer misadventure or insanity from the motivelessness of the act. We have no right to make such an inference because the motive is disproportionate. We are all of us apt to act upon very inadequate motives; and the history of crime shows that crimes are generally committed from motives comparatively trivial. A man unaccustomed to control his passions, and unregulated by religious or moral sense, exagerates an affront or nourishes a suspicion, until he determines that only the blood of the supposed offender can relieve the pang. So, also, for the smallest plunder murders have been deliberately executed. We have an illustration of this in the trial of Muller, in England, in 1873, for the killing of Briggs. Briggs's watch was seen by Muller in a railway car. Briggs was asleep; the watch was exposed; and Muller killed Briggs by a sudden attack, and succeeded in making his escape. He was afterwards arrested, convicted on circumstantial evidence, and before execution confessed the homicide with the murder. Until the confession the justice of the conviction was largely criticised on the ground that the stealing of a watch was not a motive that could explain a murder so bold, so cruel, and the chances of exposure so great. But the reply to this is obvious. Crime is rarely logical. Under a government

where the laws are executed with ordinary certainty, all crime is a blunder as well as a wrong. If we should hold that no crime is to be punished
287 except such as is rational, then there would be no crime to be punished, for no crime can be found that is rational. The motive is never correlative to the crime; never accurately proportioned to it. Nor does this apply solely to the very poor. Very rich men have been known to defraud others even of trifles, to forge wills, to kidnap and kill so that an inheritance might be theirs. When a powerful passion seeks gratification it is no extenuation that the act is illogical, for when passion is once allowed to operate reason loosens its restraints."

Now, in this connection, if you believe, at the time of this killing, Hanson and these other boys had entered into a fight, had come up and attacked the defendant with sticks, as is claimed by him and as is claimed by some of these other witnesses, and that he killed him at that time, and under such circumstances, if it was not done in a brutal and unnatural and specially wicked way, that would be a state of case where manslaughter would exist, provided the defendant by his actions of a violent character and his conduct did not bring on the conflict of that kind. If he brought it on, if he precipitated it by a violent act upon his part, then there could be no mitigation in it; there could be no self-defense, as I will tell you presently. But if, on the other hand, he went up and put his pistol across that fence, and jumped over the fence, and attacked the Hanson boy, struck him in the mouth, and at the same time attempted to shoot him, and subsequently in the consummation of that attempt did shoot him, and followed up that shooting when he was retreating and shot him in the back, that would be a state of case where there would be no manslaughter in it; it would be murder under the definition of that crime as I have given it to you.

288 We come now to the other definition. It has been invoked in this case. And I give it in these cases whether it has been invoked or not, because we can frequently reason and come to a conclusion by means of elimination, just as in algebra you can eliminate certain quantities from a certain side of an equation, and thus get at a certain quantity, and get at a methodical conclusion in a reasonable way in that manner. Now, if we have the definition of these three conditions, and if you can eliminate two of them, you necessarily drop down to the other condition as existing, because there can not be but one which is true. The conditions are the opposite to each other, and you can not find the existence of any two of them in a case. There is one certain condition that is applicable to the facts. Therefore, when you have these conditions all before you, you can the better say whether it is murder or manslaughter, or a case of justifiable homicide. Now, what is justifiable homicide? When can a man slay another? When can he sit as a judge passing upon the law, and a jury passing on the facts, and then as a jury applying the law to those facts, and finding a verdict, and then acting again as the court and entering up judgment, and then going out as a marshal or sheriff and executing that judgment, all at the same time—determining the law, determining the facts as judge, jury, and executioner all at the same time? This is a mighty power in the hands of the citizen. It is a mighty power, yet it is to be applied when it belongs to him because it is the law of necessity, and

it is given to him because it is the law of necessity; it is given to him because at the time he executes it in a deadly way his own life is either actually or really in deadly peril from which he can not escape,
289 except by the use of that deadly means, or, in your judgment, taking into consideration his condition, there was reasonable ground to believe there was peril. That is what is meant by it. It is a law of protection; it is a law of necessity. This is the law you are setting here to execute. It is a law of self-defense. You are to execute it for the sake of society, for the protection of the members of society against the acts of violence of the wicked, which would destroy their rights to their property, jeopardise their liberties and destroy their lives. It is all a law of self-defense. The necessity is so great, in contemplation of the law, that the individual can take human life. Now, I will give you this principle of the law as defined by the leading court in this country, and a definition that has never been shaken by any court, and it is stated in very brief language, but there is a great deal in it. There are two propositions; one is a case where the danger to life is actual, is real, at the time of the killing, and that the party can not escape from it by the exercise of reasonable means, and he therefore, to save his own life, may act, and act to the extent of taking life. I read to you that first proposition, and it is this:

"A man who is in the lawful pursuit of his business"— that means he is doing what he has a right to do, he is doing no wrong, and when in that condition "he is attacked by another, under circumstances which denote an intention to take away his life or to do him some enormous bodily harm, he may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling his adversary without killing
290 him, if it be in his power." He is doing what he had a right to do, and when so situated he is attacked by another in such a way as to indicate from the nature of the attack a purpose to take away his life; not that he is assaulted in a slight way; you could not kill him for that; the law of self-defense is a law of proportions as well as a law of necessity, and it is only danger that is deadly in its character that you can exercise a deadly act against. He is attacked by another in such a way as to denote a purpose to take away his life, or to do him some great bodily harm, from which death may follow, and in such a case he may lawfully kill the assailant, when, provided he use all the means in his power otherwise to save his own life or to prevent the intended harm, such as retreating as far as he can or disabling him without killing him, if it be in his power. The act coming from the assailant must be a deadly act under this proposition. It must be an act that is hurled against him, and that he has not created it, or created the necessity for it, and it must be an act of which he can not avoid the consequences; if he can, he must avoid them; he must get out of the way of the act if he can, rather than take upon himself the responsibility of taking a human life.

Now, the other proposition is a case where the danger may not really exist at all; it may not have any existence, but there must be at the time he takes life that which would satisfy a reasonable man, situated as was the defendant, that it did not then and there exist, and a man may act upon its appearance; but there must be an appearance. A man can not act upon

bare suspicion of his own mind; he can not contemplate a state of
291 case that does not exist. If he has that confronting him which would lead a reasonable man situated as he was to the belief that there was deadly danger, he could act upon that condition, and he may kill, provided he can not avoid what seems to be real danger.

Now, I will give you an illustration: If a man is pointing a gun at you, and he fires it, and he is making motions as though he intended to repeat that act of firing, you take into account that act of firing; that is a deadly act in itself; the gun is a deadly weapon, and when it is used in that way, if you could not avoid what seemed to be danger that was likely to be recurrent in its character, you would have a right to slay the party, although it may turn out afterwards that the party was your friend, and simply perpetrating a foolish joke—trying to test your courage—but he was doing an act that seemed to be deadly, and in a case of that kind you could act on this law of apparent danger and take life, if you could not avoid that which seemed to be real danger in any other way. But suppose a party was not doing anything of that kind, and that you took it into your head you had a right to slay him, you could not invoke the law of apparent danger then, because there are no circumstances upon which you can rest a conclusion; there are no facts from which a reasonable man would conclude that the danger was deadly. Now, these are the principles of the law of self-defense, and the principles underlying them must spring into existence from the act of the party slain at the time he was slain. If the danger was created by the act of the defendant—by his con'uct—that is to say, if a man goes out and by some provocation, by some provocative act, he induces that other to act in a deadly way, and then he slays him, there is no law of self-defense for him, because he is
the creator of the condition under which he acts, and the condition
292 must spring into existence as the act of the party slain, and not as the act of the party who does the slaying. If he does certain things which have a tendency to create a state of deadly danger from the adversary, he is cut off from the law of self-defense, and he can not invoke it, and he can not set up that he may take life and then be excused in doing it. And one of these acts which is enumerated by the law is for a man to arm himself and to seek another that he may find his adversary in order that he may have a deadly difficulty with him. If I have had a quarrel, or a misunderstanding with another, and I go off and arm myself and hunt that other up for the purpose of having a deadly difficulty with him, there is no law of self-defense for me. If I shoot him in that difficulty, no matter what he does, I am cut off from that right. Berause if I know of that state of case—if I know of a condition of bad blood, as we sometimes call it, existing between me and another—my duty is to avoid that other; at least, it is not my duty to hunt him up, arm myself, that I may have a deadly affray with him. If I do that there is no law of self-defense in the case; nor is there anything in it which makes it manslaughter, because you see it comes up to the full measure of that condition which says that if premeditation exists, if the act is contemplated, if he has thought of it beforehand, as evidenced by the deliberate selection and use of a deadly weapon, it has malice aforethought in it, and it is murder; there is no escaping it.

Now, gentlemen, these are the three conditions which I give you in this case. I have told you that if it is true that this defendant went up on one side of the wire fence, and went through it, and struck Han-
293 son in the mouth, and then shot him, that is murder. On the other hand, if it is true that Hanson and the other boys attacked him with these sticks, and while that attack was going on, and in the heat of that affray, he shot and killed Hanson, that would be manslaughter; but if there is an absence of that condition from the case then there is no manslaughter in it, nor could there be any self-defense in it. There could be nothing else but this first grade of crime known as murder, because the state of case as I have defined it to you contemplates the doing of something upon the part of the one slain, or who was shot, that was either actual and real, of a deadly character, or which seemed to be so. If they assaulted him with these sticks, and they were en'aged in a conflict and he shot him in the conflict without previous preparation, without previous deliberation, without previous selection of a deadly weapon, without a contemplated purpose to use it in a deadly way, then that would be manslaughter, and it could not be self-defense, because the injury to the other received would not be of that deadly character, or of that dangerous nature, that would give a man the right to slay another, because of threatened injury or actual injury received. I say these are the three conditions. It is for you to take this evidence in the case in order to ascertain which of these conditions exist, and I will not worry your patience by giving you anything further from the law except how these classes of evidence known as positive testimony and circumstantial evidence are regarded by it. I have given you sufficient to show you how the law regards them, that whenever there is a conflict especially in the testimony of the positive statements of witnesses about an occurrence, you are to see what circumstances are left around it
294 going to show that one or the other of these statements are true, and which one is true, the one showing the occurrence as it transpired. Then I ask you to take into consideration all the evidence of that kind; the evidence of witnesses given to you in the shape of positive statements; you are to weigh these statements, and you are to take them in connection with these circumstantial facts. There is another thing; when a witness goes on the stand it is your duty to measure and to weigh the credibility of that evidence given by him, and you do it by his appearance, the manner in which he testifies, the character of the evidence, its probability and reasonableness, and by the light of your best judgment. Then you take the evidence of that witness, and you see whether or not it harmonizes and corresponds with the statements made by the witness at other times and other places. If it does not it is evidence which is false, because the truth at all times is in harmony. The statement of a witness upon the stand if he is telling the truth, unless he is able to explain to you that he may have made a mistake at some other time, must be in substantial harmony with all other statements going to illustrate the transaction given to others at other times. If he has made statements contradicting what he has said on the stand, that is evidence of the falsity of the statement given by the witness on the stand. That is a legitimate way; it is one of the correct methods; it is one of the certain methods of weighing the

evidence of witnesses, one of the correct ways of ascertaining whether it is a falsehood or not, and if he is false in one particular in a material respect, while he may tell the truth in some other particulars, yet it creates
295 such a presumption against his evidence as that you would not be authorized to take it but as being worthless, unless he explains its inconsistency.

Now, in this case the defendant has gone on the stand before you and made a statement. You are to see how this harmonizes with these circumstances going to illustrate the character of this occurrence. If they in harmony, then that would go to support his evidence. If his testimony is contradicted by facts of that character then it is weakened because of this contradiction. He is before you charged with this great crime; if you find him guilty of murder, and the President of the United States does not interfere in his behalf, he must pay the forfeit with his own life. He apparently has intelligence enough to know that. You are to see his condition, and the circumstances under which he testified, in passing upon the truthfulness of his evidence; and above all you are to weigh that evidence in the light of the other facts and in the light of the other circumstances that you may find to be true. If these other facts and circumstances contradict him, his testimony is weakened, and it may be destroyed by these contradicting facts. If they correspond, are in harmony, then that would strengthen his evidence. You are to take the evidence of all these witnesses, to weigh it properly and deliberately and dispassionately, by the light of the rules I have given you; by the light of your experience and observation in life, as to the actions and conduct of men under a given set of facts and circumstances in order that you may be able to get at the very truth in this case, because that is what you want to find. You want to find first if a man has been killed. That you have no difficulty in finding. You want to find the means used in taking his life, and you
296 have no difficulty in that particular. You want to find then who it was that took his life; then you want to find the character of the act that resulted in his death, and then your duty is to see exactly and correctly what that character of act is, because it is not only for this case that this verdict stands, but it is for the vindication and the support and maintenance of the law that you are to speak the exact truth, as the word "verdict" implies.

Now, a word as to the accountability of this defendant. The law says that when a child between the years of seven and eleven commits a crime he is presumably not held accountable, yet this presumption may be overcome by proof; but from eleven years up the law contemplates that he is accountable for his criminal acts; that he is said to be conscious of right and wrong so as to be held responsible by the law, and to take away that condition it requires the production of proof showing the lack of accountability. In legal contemplation from eleven years upwards he is accountable.

Now, you can not find the defendant guilty of any crime unless you are satisfied from the whole of this testimony, and from the law that I have given you, that the state of case which makes the crime is established beyond a reasonable doubt. That means established to that degree of certainty that reasonable men are satisfied by the testimony that the condi-

tion is established with that degree of certainty that they would act upon that conclusion as reasonable citizens outside of the jury box, and would come to a like conclusion and act upon it in the performance of their duties as citizens; in other words, that it is established, and so established that there is driven out of the case, not any doubt, not every doubt,

297 because you can not drive out that kind of doubts from cases; they flit before us always when we are hunting for conclusions, just like the flies and gnats before us in summer; we can not get rid of these things, but they are not doubts that we pay any attention to. The law defines the kind of doubt that we are to regard as a doubt for which a good reason can be given; a doubt that would so operate upon the mind of a reasonable man that he is not able to say that he has an abiding conviction to a moral certainty of the truth of the charge. When his mind is in that condition it is not satisfied; the case is not proven; but when it is carried beyond that, when he considers the law as given defining the crime, when he considers the proof as offered, when he makes an application of the truth as derived from the proof as offered to the law defining the crime, and he is able to say that he has an abiding conviction to that degree of certainty that he would require to exist before he would act upon it as a citizen, his duty is to say that the crime is established, and that it is proven, and his duty would be consequently to find guilt of crime of the kind found to be so established.

Now, gentlemen, if you find the defendant guilty of the crime of murder, you are to say on the back of this indictment, "We, the jury, find the defendant guilty of murder as charged in the indictment," and sign it by one of your number as foreman. If you find him guilty of manslaughter, you say, "We, the jury, find the defendant guilty of manslaughter as charged in the indictment," and sign it by one of your number as foreman. If you find the defendant not guilty, you will say, "We, the jury, find the defendant not guilty as charged in the within indictment," and sign it by one of your number as foreman.

298 I submit the case to you with the certain belief, with the abiding conviction, that you will do that equal and exact justice that your oaths demand you shall do; if the law has been violated that you will uphold it, and you will support it, and you will see to its enforcement. If it has not been violated, you will see that it is upheld and enforced by finding the defendant not guilty. Look at all the facts and circumstances, find where the truth lies in the case, and fasten your faith and your conviction upon that truth, and you will be safe.

You will retire to consider the case.

6:25 p. m.

Verdict, "Guilty of murder."

299 To the giving of said charge the defendant at the time excepted.

The court, among other things, charged the jury as follows:

"Now, what is justifiable homicide? When can a man slay another? When can he sit as a judge passing upon the law, and as a jury passing on the facts, and then as a jury applying the law to those facts and finding a verdict, and then acting again as a court and entering up judgment, and then going out as a marshal or sheriff and executing that judgment all

at the same time—determining the law, determining the facts as a judge and executioner all at the same time? This is a mighty power in the hands of the citizen. It is a mighty power, yet it is to be applied when it belongs to him, because it is the law of necessity, and it is given to him because it is the law of necessity; it is given to him because at the time he executes it in a deadly way his own life is either actually or really in deadly peril from which he can not escape except by the use of that deadly means, or in your judgment, taking ir to consideration his condition, there was reasonable ground to believe there was deadly peril. That is what is meant by it. It is a law of protection; it is a law of necessity. This is the law you are sitting here to execute. It is a law of self-defense. You are to execute it for the sake of society, for the protection of the members of society against the acts of violence of the wicked, which would destroy their rights to their property, jeopardize their liberties, and destroy their lives. It is all a law of self-defense. The necessity is so great in contemplation of the law that the individual can take human life. Now,
300 I will give you this principle of the law as defined by the leading courts in this country, and a definition that has never been shaken by any court, and it is stated in very brief language, but there is a great deal in it. There are two propositions: One is a case where the danger to life is actual, is real, at the time of the killing, and that the party can not escape from it by the exercise of reasonable means, and he, therefore, to save his own life may act and act to the extent of taking life. I read to you that first proposition, and it is this:

"A man who is in the lawful pursuit of his business—that means he is doing what he has a right to do, he is doing no wrong—and when in that condition he is attacked by another under circumstances which denot' an intention to take away his life or to do him some enormous bodily harm, he may lawfully kill his assailant, provided he use all the means in his power otherwise to save his own life or to prevent the intended harm, such as retreating as far as he can, or disabling his adversary without killing him, if it be in his power. He is doing what he has a right to do, and when so situated he is attacked by another in such a way as to indicate from the nature of the attack a purpose to take away his life—not that he is assaulted in a slight way—you could not kill him for that; the law of self-defense is a law of proportion as well as a law of necessity, and it is only danger that is deadly in its character that you can exercise a deadly act against. He is attacked by another in such a way as to denote a purpose to take away his life or to do him some great bodily harm, from which death may follow, and, in such case, he may lawfully kill the assailant when? Provided he use all means in his power otherwise to save his own life, or prevent the intended harm, such as retreating as far
301 as he can or disabling him without killing him, if it be in his power. The act coming from the assailant must be a deadly act under this proposition. It must be an act that is hurled against him, and that he has not created it, or created the necessity for it; and it must be an act of which he can not avoid the consequences; if he can, he must avoid them; he must get out of the way of the act if he can, rather than take upon himself the responsibility of taking a human life."

To the giving of this charge the defendant at the time excepted.

The court among other things gave to the jury the following charge:

"Now, in this case, the defendant has gone on the stand before you and made a statement. You are to see how this harmonizes with those circumstances going to illustrate the character of this occurrence. If they are in harmony then that would go to support his evidence. If his testimony is contradicted by facts of that character then it is weakened because of this contradiction. He is before you charged with this great crime; if you find him guilty of murder and the President of the United States does not interfere in his behalf, he must pay the forfeit with his own life. He apparently has intelligence enough to know that. You are to see his condition and the circumstances under which he testified; in passing upon the truthfulness of his evidence you are to weigh that evidence in the light of the other facts and in the light of the other circumstances that you may find to be true. If these other facts and circumstances contradict him his testimony is weakened and it may be destroyed by these contra-
302 dictory facts. If they correspond, are in harmony, then that would strengthen his evidence. You are to take the evidence of all these witnesses, to weigh it properly and deliberately and dispassionately by the light of the rules I have given you, by the light of your experience and observation in life as to the actions and conduct of men under a given set of facts and circumstances, in order that you may be able to get at the very truth in this case, because that is what you want to find. You want to find first if a man has been killed. That you have no difficulty in finding. You want to find the means used in taking his life and you have no difficulty in that particular. You want to find then who it was that took his life; then you want to find the character of the act that resulted in his death and then your duty is to see exactly and correctly what that character or act is, because it is not only for this case that this verdict stands, but it is for the vindication and the support and maintenance of the law that you are to speak the exact truth as the word 'verdict' implies."

To the giving of this charge the defendant at the time excepted.

The court among other things charged the jury as follows:

"Now, a word as to the accountability of this defendant. The law says that when a child between the years of seven and eleven commits a crime he is presumably not held accountable, yet this presumption may be overcome by proof; but from eleven years up the law contemplates that he is accountable for his criminal *a* acts; that he is said to be conscious of right and wrong so as to be held responsible by the law, and to take away that condition it requires the production of proof showing the lack of accountability.

303 "In legal contemplation, from eleven years upwards he is accountable."

To the giving of this charge to the jury the defendant at the time excepted.

The defendant then made a motion for a new trial, which motion is as follows:

United States circuit court, western district of Arkansas.

UNITED STATES
vs.
ALEXANDER ALLEN.

Now comes the defendant, Alexander Allen, and moves the court to set aside the verdict in this case and grant him a new trial in this case, and for causes for said motion assigns the following:

1st. Because the court erred in instructing the jury as to the law of the case.

2nd. Because the verdict is contrary to the law.

3rd. Because the verdict is contrary to the evidence.

4th. Because the verdict is contrary to the law and the evidence.

And for other good and sufficient causes.

FREDERICK & RUTHERFORD,
Attys. for Deft.

Which motion was by the court overruled, and in overruling the court made the following remarks:

304 UNITED STATES
vs.
ALEXANDER ALLAN.

A motion for a new trial has been filed in this case, containing the following causes:

First. Because the court erred in instructing the jury as to the law of this case.

Second. Because the verdict is contrary to the law.

Third. Because the verdict is contrary to the evidence.

Fourth. Because the verdict is contrary to the law and and the evidence.

I am not aware of any error made by the court in its charge to the jury. Nor can I say that this verdict was against the evidence or the law of the case. I would not, therefore, be authorized under the law to disturb it, as a court has no right to disturb verdicts wantonly, reckless or even carelessly. Verdicts of juries, if they are supported by the law and the evidence, should be held sacred, as they, if so supported, become the result of the honest, deliberate judgment of twelve citizens clothed with the very highest powers, and filling for the time the most responsible office. It is by cultivating a very high regard for a proper verdict of a jury that trial by juries becomes an effective and powerful factor in the protection of life, liberty, and property. The motion for a new trial will, for the reasons already stated, be overruled.

305 To which ruling of the court the defendant at the time excepted, and tenders this bill of exceptions and prays that they be signed and made a part of the record in this case, which is accordingly done.

I. C. PARKER,
U. S. District Judge, holding Circuit Court.

306 *Assignment of errors.—Filed June* 14, 1893.

United States circuit court, western district of Arkansas.

UNITED STATES
vs.
ALEXANDER ALLEN. } Murder.

The defendant, Alexander Allen, in the above-entitled cause, files this, his assignment of errors committed on the trial of said cause, to wit:

1st. It was error for the court to charge the jury as follows:

"Now, what is justifiable homicide? When can a man slay another? When can he sit as a judge passing upon the law, and a jury passing upon the facts, and then as a jury applying the law to those facts, and finding a verdict, and then acting again as a court and entering up judgment, and then going out as a marshal or sheriff and executing that judgment all at the same time, determining the law, determining the facts as a judge, jury, and executioner all at the same time. This is a mighty power in the hands of the citizen. It is a mighty power, yet it is to be applied when it belongs to him because it is the law of necessity, and it is given to him because it is the law of necessity. It is given to him becau'e at the time he executes it in a deadly way his own life is either actually or really in deadly peril from which he can not escape except by the use of that deadly means, or in your judgment taking into consideration his condition there was reasonable ground to believe there was deadly peril.

That is what is meant by it. It is a law of protection. It is a
307 law of necessity. This is the law you are sitting here to execute.

It is a law of self-defense. You are to execute it for the sake of society, for the protection of the members of society against the acts of violence of the wicked, which would destroy their rights to their property, jeopardize their liberties, and destroy their lives. It is all a law of self-defense. The necessity is so great in contemplation of the law that the individual can take human life. Now, I will give you the principle of the law as defined by the leading courts in this country and a definition that has never been shaken by any court, and it is stated in very brief language, but there is a great deal in it.

There are two propositions; one is a case where the danger to life is actual, is real, at the time of the killing and that the party can not escape from it by the exercise of reasonable means, and he therefore, to save his own life, may act and act to the extent of taking life. I read to you that first proposition, and it is this:

"A man who is in the lawful pursuit of his business," that means he is doing what he has a right to do, he is doing no wrong, and when in that condition he is attacked by another under circumstances which denote an intention to take away his life or to do him some enormous bodily harm, he may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or to prevent the intended harm, such as retreating as far as he can or disabling his adversary without killing him if it be in his power; "he is doing what he had a right to do, and when so situated he is attacked by another in such a way as to indicate from the nature of the attack a purpose to take away his life—not

that he is assaulted in a slight way; you could not kill him for
308 that; the law of self-defense is a law of proportions as well as a law of necessity, and it is only danger that is deadly in its character that you can exercise a deadly act against it. He is attacked by another in such a way as to denote a purpose to take away his life or to do him some great bodily harm, from which death may follow, and in such case he may lawfully kill the assailant. When? Provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can or disabling him without killing him if it be in his power. The act coming from the assailant must be a deadly act under this proposition. It must be an act that is hurled against him and that he has not created it or created the necessity for it, and it must be an act of which he can not avoid the consequences. If he can he must avoid them; he must get out of the way of the act if he can rather than take upon himself the responsibility of taking a human life."

It was error for the court o charge the jury as follows:

"Now, in this case the defendant has gone on the stand before you and made a statement. You are to see how this harmonizes with those circumstances going to illustrate the character of this occurrence. If they are in harmony, then that would go to support his evidence. If his testimony is contradicted by facts of that character, then it is weakened because of this contradiction. He is before you charged with this great crime, if you find him guilty of murder and the President of the United States does not interfere in his behalf, he must pay the forfeit with his own life. He apparently has intelligence enough to know that; you are to see his condition and circumstances under which he testified in passing upon the
309 truthfulness of his evidence, and above all you are to weigh that evidence in the light of the other facts and circumstances that you may find to be true. If these other facts and circumstances contradict him his testimony is weakened and it may be destroyed by these contradictory facts. If they correspond, are in harmony, then that would strengthen his evidence. You are to take the evidence of all these witnesses, to weigh it properly and deliberately and dispassionately by the light of the rules I have given you, by the light of your experience and observations in life as to the actions and conduct of men under a given set of facts and circumstances in order that you may be able to get at the very truth in this case, because that is what you want to find. You want to find, first, if a man has been killed. That you have no difficulty in finding. You want to find the means used in taking his life, and you have no difficulty in that particular. You want to find, then, who it was that took his life; then you want to find the character of the act that resulted in his death, and then your duty is to see exactly and correctly what that character of act is because it is, not only for this case that this verdict stands, but is for the vindication and the support and maintenance of the law that you are to speak the exact truth as the word 'verdict' implies."

It was error for the court to charge the jury as follows:

"Now, a word as to the accountability of this defendant. The law says that when a child between the years of seven and eleven commits a crime he is presumably not held accountable, yet this presumption may be overcome by proof, but from eleven years up the law contemplates that
310 he is accountable for his criminal acts; that he is said to be conscious of right and wrong so as to be held responsible by the law, and to

take away that condition it requires the production of proof showing lack of accountability. In legal contemplation from eleven years upwards he is accountable."

It was error for the court to overrule the defendant's motion for a new trial.

It was error for the court to sentence the defendant.

For the errors here assigned, together with divers and sundry other errors committed on the trial of this cause, it is submitted that this case should be reversed and a new trial granted the defendant, to the end that justice be done the defendant according to law.

ALEXANDER ALLEN,
By FREDERICK & FREDERICK,
His Attorneys.

311 *Petition for writ of error—Filed June* 14, 1893.

Circuit court of the United States, western district of Arkansas.

UNITED STATES
vs.
ALEXANDER ALLEN. } Murder.

To the Clerk of the Circuit Court of the United States for the Western District of Arkansas:

Your petitioner respectfully represents that at the Feb'y term, 1893, of said court he was convicted on an indictment charging him with the crime of murder, and that the said court pronounced judgment and sentence of death upon petitioner on the verdict of the jury convicting him as aforesaid.

Your petitioner alleges that in the record and proceedings in the trial of said cause there is great and manifest error to the prejudice and great damage of your petitioner. He therefore prays that a writ of error from the Supreme Court of the United States be issued by you under the seal of said circuit court in said cause, removing said cause and the record therein to the said Supreme Court in order that the same may be there examined, and if error be found that the judgment and sentence against him there may be reversed.

ALEXANDER ALLEN,
By FREDERICK & FREDERICK,
His Att'ys.

312 *Affidavit of poverty—Filed June* 14, 1893.

United States circuit court, western district of Arkansas.

UNITED STATES
vs.
ALEXANDER ALLEN. } Murder.

I, Alexander Allen, the defendant in the above-stated cause, do solemnly swear that I am not possessed of sufficient means, and am not worth $10.00

above my wearing apparel, and am unable to procure the same so as to prosecute the appeal taken in said cause in the Supreme Court of the United States.

I therefore pray that it be prosecuted in forma pauperis.

ALEXANDER ALLEN.

Subscribed and sworn to before me this the 14th day of June, 1893.

STEPHEN WHEELER, *Clerk*,
By J. M. BAXTER, *D. C.*

313 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the U. S. circuit court for the western dist. of Arkansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between the United States of America and Alexander Allen, a manifest error hath happened, to the great damage of the said Alexander Allen, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 60 days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 27 day of June, in the year of our Lord one thousand eight hundred and ninety-three.

STEPHEN WHEELER,
Clerk of the Circuit Court of the United States
for the Western District of Arkansas.

314 UNITED STATES OF AMERICA, *ss:*

To James F. Read, U. S. district attorney for western district of Arkansas, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the western district of Arkansas, wherein Alexander Allen, under indictment for murder, is plaintiff in error, and the United States, defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable I. C. Parker, judge of the district court of the United States for the western district of Arkansas, this 29 day of June, in the year of our Lord one thousand eight hundred and ninety-three.

I. C. PARKER,
U. S. District Judge holding circuit court.

315 I, Jas. F. Read, U. S. district att'y for the western dist. of Arkansas, hereby accept service of the within citation, this 29 day of June, 1893.

JAS. F. READ,
Dist. Atty.

316 UNITED STATES of AMERICA,
Western District of Arkansas:

I, Stephen Wheeler, clerk of the circuit court of the United States for the western district of Arkansas in the eighth circuit, hereby certify that the foregoing transcript, annexed to this certificate, is a true and complete copy of the record in the case of U. S. vs. Alexander Allen, the original of which remains of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Fort Smith, in said district, this 7th day of July, A. D. 1893.

[SEAL.] STEPHEN WHEELER, *Clerk.*
By I. M. DODGE, *D. C.*

(Indorsement on cover:) Case No. 15353. Term No. 969. Alexander Allen, plaintiff in error, vs. The United States. W. Arkansas C. C. U. S. Supreme Court U. S. Received July 22, 1893. Clerk's office. Filed July 22, 1893.

Office Supreme Court U. S.
FILED.
OCT 5 1893
JAMES. H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

ALEXANDER ALLEN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

No. 969.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

A. H. GARLAND,
Attorney for Plaintiff in Error.

IN THE

Supreme Court of the United States.

ALEXANDER ALLEN, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES.

No. 969.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

ABSTRACT.

The plaintiff in error, Alexander Allen, was, at the November term, 1892, of the United States Circuit Court for the Western District of Arkansas, indicted for the murder of Phillip Hanson, in the Cherokee Nation on the 14th day of May, 1892 (Record page 1).

The facts briefly stated are about as follows: The plaintiff

in error was a colored boy about fifteen years of age, at the time of the homicide (Record pages 131 and 139).

He was working for Albert Marks, who lived in the town of Coffeyville, Kansas, and who had a farm in the Cherokee Nation three or four miles from Coffeyville (Record pages 120 and 121).

The plaintiff in error had gone to the farm a few days before the killing to help at the farm and was sent to look for some horses and met up with deceased and two other white boys and he made enquiry of the boys about the horses (Record pages 6 and 7).

An altercation of words ensued but no fight (Record pages 91, 92, 93 and 94).

The deceased, Phillip Hanson, was eighteen years old, the other two white boys were sixteen and fourteen years of age (Record pages 6 and 27).

On the day of the killing the plaintiff in error and the Marks' boy had gone to the farm to get a churn of milk and there met deceased and the other white boys. A difficulty arose at the farm where the plaintiff in error shot and killed the deceased with a pistol (Record pages 10 and 11).

There is considerable conflict in the evidence as to how the fight occurred. The plaintiff in error offered evidence to show that he was assaulted by the white boys and shot in self-defense against an assault on him by the white boys with clubs.

See evidence of—

Jas. Marks, Record page 91.

Harvey Marks, Record page 103.
Wm. Marks, Record page 120.
Albert Marks, Record page 127.
Alexander Allen, Record page 139.

There are five assignment of errors which are as follows:

First. It was error for the court to charge the jury as follows:

"Now, what is justifiable homicide? When can a man slay another? When can he sit as a judge passing upon the law, and jury passing upon the facts, and then as a jury applying the law to those facts, and finding a verdict, and then acting again as a court and entering up judgment, and then going out as a marshal or sheriff and executing that judgment all at the same time, determining the law, determining facts as a judge, jury, and executioner all at the same time. This is a mighty power in the hands of the citizen. It is a mighty power, yet it is to be applied when it belongs to him because it is the law of necessity, and it is given to him because it is the law of necessity. It is given to him because at the time he executes it in a deadly way his own life is either actually or really in deadly peril from which he can not escape except by the use of that deadly means, or in your judgment taking into consideration his condition there was reasonable ground to believe there was deadly peril. That is what is meant by it. It is a law of protection. It is a law of necessity. This is the law you are sitting here to execute. It is a law of self-defense. You are to execute it for the sake of society,

for the protection of the members of society against the acts of violence of the wicked, which would destroy their rights to their property, jeopardize their liberties, and destroy their lives. It is all a law of self-defense. The necessity is so great in contemplation of the law that the individual can take human life. Now, I will give you the principle of the law, as defined by the leading courts in this country and a definition that has never been shaken by any court, and it is stated in very brief language, but there is a great deal in it.

There are two propositions; one is a case where the danger to life is actual, is real, at the time of the killing and that the party can not escape from it by the exercise of reasonble means, and he therefore, to save his own life, may act and act to the extent of taking life. I read to you that first proposition, and it is this:

'A man who is in the lawful pursuit of his business,' that means he is doing what he has a right to do, he is doing no wrong, and when in that condition he is attacked by another under circumstances which denote an intention to take away his life or to do him some enormous bodily harm, he may lawfully kill his assailant, provided he use all the means in his power otherwise to save his own life or to prevent the intended harm, such as retreating as far as he can or disabling his adversary without killing him if it be in his power; 'he is doing what he had a right to do, and when so situated he is attacked by another in such a way as to indicate from the nature of the attack a purpose to take away his life—not that he is assaulted in a slight

way; you could not kill him for that; the law of self-defense is a law of proportions as well as a law of necessity, and it is only danger that is deadly in its character that you can exercise a deadly act against it. He is attacked by another in such a way as to denote a purpose to take away his life or to do him some great bodily harm, from which death may follow, and in such a case he may lawfully kill the assailant. When? Provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can or disabling him without killing him if it be in his power. The act coming from the assailant must be a deadly act under this proposition. It must be an act that is hurled against him and that he has not created it or created the necessity for it, and it must be an act of which he can not avoid the consequences. If he can he must avoid them; he must get out of the way of the act if he can rather than take upon himself the responsibility of taking a human life."

Second. It was error for the court to charge the jury as follows:

"Now, in this case the defendant has gone on the stand before you and made a statement. You are to see how this harmonizes with those circumstances going to illustrate the character of this occurrence. If they are in harmony, then that would go to support his evidence. If his testimony is contradicted by facts of that character, then it is weakened because of this contradiction. He is before you charged with this great crime, if you find him guilty of murder and the President of

the United States does not interfere in his behalf, he must pay the forfeit with his own life. He apparently has intelligence enough to know that; you are to see his condition and circumstances under which he testified in passing upon the truthfulness of his evidence, and above all you are to weigh that evidence in the light of the other facts and cirumstances that you may find to be true. If these other facts and circumstances contradict him his testimony is weakened and it may be destroyed by these contradictory facts. If they correspond, are in harmony, then that would strengthen his evidence. You are to take the evidence of all these witnesses, to weigh it properly and deliberately and dispassionately by the light of the rules I have given you, by the light of your experience and observations in life as to the actions and conduct of men under a given set of facts and circumstances in order that you may be able to get at the very truth in this case, because that is what you want to find. You want to find, first, if a man has been killed. That you have no dfficulty in finding. You want to find the means used in taking his life, and you have no difficulty in that particular. You want to find, then, who it was that took his life; then you want to find the character of the act that resulted in his death, and then your duty is to see exactly and correctly what that character of act is, because it is, not only for this case that this verdict stands, but is for the vindication and the support and maintenance of the law that you are to speak the exact truth as the word 'verdict' implies."

Third. It was error for the court to charge the jury as follows:

"Now, a word as to the accountability of this defendant. The law says that when a child between the years of seven and eleven commits a crime he is presumably not held accountable, yet this presumption may be overcome by proof, but from eleven years up the law contemplates that he is accuntable for his criminal acts; that he is said to be conscious of right and wrong so as to be held responsible by the law, and to take away that condition it requires the production of proof showing lack of accountability. In legal contemplation from eleven years upwards he is accountable."

The fourth and fifth assignment of errors are as to the court's action in overruling the defendant's motion for a new trial, and in sentencing the defendant.

ARGUMENT.

In the first assignment of error the court told the jury that when a man slays another in self-defense he sits as judge and passes on the law, and as jury and passes on the facts, and then as a jury applies the law to those facts and finds a verdict, and then enters up a judgment as a court and then go out as marshal or sheriff and executes that judgment all at the same time; determining the law, determining the facts as a judge and executioner all at the same time. "This is a mighty power in the hand of a citizen."

We do not understand such to be the law.

In the second assignment of errors the court makes an argument to the jury, as we understand it, against the credibility of

the defendant as a witness in his own behalf. We understand the law that allows him to testify was intended to make him a competent witness. His evidence should be allowed to go to the jury to be weighed by the jury as they would weigh the evidence of any other witness. It is not necessary that the judge should single him out for special caution to the jury.

In the third assignment of error the court told the jury that a defendant eleven years and older was accountable for his criminal acts. But ought not the jury to be told also that in dealing with a person so young as this defendant, that they should be careful to see that the proof was strong and clear and beyond a reasonable doubt before they would be warranted in finding the defendant guilty of murder? This was not a case of assassination. It was a fight, and the court should have advised the jury as to this point in coming to a conclusion as to whether the killing was done with malice. And if not done with malice it could not have amounted to more than manslaughter. We believe from a full review of this record that the defendant should have been found guilty of manslaughter. That is the most of which he is guilty.

Respectfully submitted,

A. H. GARLAND,

Attorney for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

ALEXANDER ALLEN, PLAINTIFF IN error,
v.
THE UNITED STATES. } No. 969.

STATEMENT OF THE CASE.

At the November term, A. D. 1892, of the circuit court for the western district of Arkansas, the plaintiff in error was indicted for the murder of Philip Henson, in the Indian country. At the February term, 1893, of said court he was tried upon said indictment and convicted of the crime of murder. He filed his motion to set aside the verdict and grant a new trial, which was by the court overruled. Plaintiff in error was then sentenced to death. He then filed his assignment of errors and prayed a writ of error to this court, which was granted.

THE FACTS OF THE CASE.

The whole evidence shows that on the morning of the 14th of May, 1892, Mrs. Magdalene Erne sent her two little boys, George Erne, age 15 (p. 15), and Willie Erne,

aged 14 (p. 31), after goslings. They returned home, bringing with them Philip Hanson, aged 18 (p. 15). The three boys then left the house, going diagonally through a wheat field toward a lake; they each carried in their hands willow sticks with the bark peeled off, with which to kill bullfrogs to use for bait in fishing; they went in an easterly direction (pp. 43–45). When about halfway across the wheat field they saw on the eastern side of a fence which separated the wheat field from the land of Albert Marks, two boys—Alexander Allen, the plaintiff in error here, and Harvey Marks (pp. 10, 106)—Allen 15 years old (p. 139), and Harvey Marks 12 years old (p. 103). An altercation ensued, in which Alexander Allen shot Philip Hanson with a pistol, from which wound he died in a few minutes.

George Erne and Willie Erne testify that the prisoner took his pistol out of his hip pocket, removed the rubber scabbard, handed the scabbard to Harvey Marks, and climbed through the wire fence from the east side to the west side, where the deceased and his comrades were; that he struck Philip Hanson, the deceased, with his left hand, and then with the pistol in his right hand shot Hanson twice and shot George Erne through the arm (pp. 11 and 30).

The prisoner and Harvey Marks testify that Philip Hanson and his two comrades came through the fence from the wheat field on the west side into the yard of Marks and began the assault by Philip Hanson striking the prisoner over the head with a stick; that Philip Hanson and the prisoner closed in and wrestled, and Philip Hanson threw the prisoner and had him down, and that

George Erne then struck the prisoner on the arm with a stick; that the prisoner while lying on the ground with Philip Hanson upon him drew the pistol from his pocket and shot Philip Hanson; that Hanson, after he was shot, ran toward the fence about 40 steps off and climbed through the fence back into the wheat field (pp. 107 and 142).

Magdalene Erne, summoned to the scene in a few minutes by her son Willie, found the dead body of Philip H[illegible]on lying in the wheatfield about 30 or 35 steps from the fence (p. 42).

Abner G. Thompson examined the body half an hour after the homicide and describes the character and location of the wounds (pp. 78–80).

James A. Aldridge and J. W. Hayden visited the ground where the shooting occurred on the day after its occurrence. They passed from Erne's house, through the wheatfield, under the guidance of Willie Erne, and observed the tracks of the three boys very plain and distinct in the soft ground, going in a northeasterly direction through the wheatfield directly toward the lake. At the scene of the shooting they observed the wheat trampled down and blood on the ground at a distance of 38 steps from the fence. From this point to the fence they observed a single track *coming from the fence westward.* The single track from the fence to the scene of the shooting differed from the tracks made by the other boys in this, *that it had shoes on*, while the other three were barefooted (pp. 58 and 66; A. W. Knott's testimony, p. 81).

Philip Hanson and the two Erne boys on that occasion were barefooted, while Alexander Erne, the plaintiff in error, had on either boots or shoes (p. 73).

As soon as the prisoner had shot Philip Hanson, he ran back to the fence, got through, went to the house, got his satchels, came out, got in his cart and drove as rapidly as possible to Coffeeville (pp. 11, 144); he went then 16 miles on foot to Edna, Kans., on his way to Oswego (p. 144).

N. M. Clifford, United States marshal for the district of Kansas, learned at 1 p. m., May 14, 1892, that a boy had been killed and that the man that did the shooting had come to Coffeeville and had gone east on the railway track; at about 2:30 p. m., Clifford, with Mr. Knotts, started to find him and did find him at Edna, Kans. (p. 47).

When Clifford and Knott reached Edna, Kans., they found the prisoner sitting on the platform of the depot; Clifford called to him to come to him; the prisoner looked at the two men sitting in their buggy, and turned and ran as fast as he could; Knott jumped out of the buggy and ran around the depot, pursuing the prisoner down the railroad track, calling upon him to stop and firing his pistol 10 or 15 feet in front of the prisoner and across his track; the boy broke through a hedge fence into a field where Knott was unable to follow him; Clifford drove across the railroad track into the field and intercepted and caught the boy; Knott then took the boy on board the cars and back to Coffeeville; on the way back, Knott asked the prisoner what he shot that boy for, and he said he was afraid they would hurt him with their sticks.

> I asked him, what sticks? and he said, "Some sticks they were carrying with them." I asked him then, if they struck him with their sticks and he said, "No, but he was afraid they would" (p. 81).

On the morning of the homicide the prisoner had gone with Marks, the grandfather of the two young Marks, to get a load of hay to take to town. On the way to town they met young Harvey Marks going down to the farm for milk. The old man, Marks, made the prisoner turn back and accompany young Harvey Marks to the farm (p. 141). The prisoner did not have his pistol with him when he met Harvey Marks and turned back with him, but he had put the pistol in his pocket after he reached the farm. He had gone into the house and had taken the pistol from his overcoat pocket, where he had placed it two days before. (See prisoner's own testimony, pp. 142, 143.) When arrested at Edna, Kans., by Mr. Clifford, the pistol was found in his "grip" (satchel), which was in his hands; it was a 32, double-action six-shooter, with a rubber scabbard on it; it had one load in (pp. 47, 48). A knife and three empty cartridge shells were found in his pocket; the shells fit the pistol. When asked by Clifford to account for the empty shells, the prisoner stated that he had emptied his pistol shooting rabbits on his way out there from Coffeeville (p. 49). When asked why, when he got to Coffeeville, he had not gone and seen Mr. Marks about the matter and told him what had occurred, or hunt up Mr. Morgan, the prisoner replied that he did not think it was worth while. "It wasn't my business, because I had done it, to go around and tell every one about it" (p. 159).

James Marks and Harvey Marks, who testified (pp. 91–105) as to the shooting and the difficulties alleged to have preceded it, were cross-examined as to certain discrepancies between their oral statements on the witness

stand and certain statements which they had made to Mr. Clifford in his office in Coffeeville, Kans., on the 21st of May, 1892, which were taken down in writing by Mr. Clifford at the time, and they each admitted that they had made such statements to Mr. Clifford, but that those statements were false (pp. 100 and 115).

Mr. Clifford proves (p. 162) that he had asked Marks, the father of the boy "if he had any objection, if he and his little boys would give me a statement of their knowledge of the affair, and he says, 'Why, certainly.' He asked me 'when?' and I said, 'As soon as possible while it is fresh in their minds,' and I said, 'I would like to have it done for my own special benefit and in justice to both parties.'" He said that the statements made by them were taken down by him verbatim as they stated, and that after that he read it over to them, every word, and that then they signed it.

From the whole testimony, then, it is apparent, that the testimony of the two young Marks, as delivered by them before the jury, should be taken with great allowance.

It is evident that the prisoner armed himself with his pistol (which he had not had about his person for two days before) for a wicked and mischievous purpose; that he was conscious of guilt, as appears from his immediate and hasty flight; that he was deliberate and thoughtful appears from his own statement—"that it wasn't his business, because he had done it, to go around and tell everyone about it;" that he was wholly without provocation appears from his confession to Knott—that the boys had not struck him with their sticks, but he was only afraid they would do it; that both he and young Marks have

concurred in false statements as to the facts of the occurrence, is manifest in this, that while they state that Philip Hanson climbed through the fence from the wheat field into Marks' lot and there begun the attack upon the prisoner, yet is it clear beyond contradiction that this could not be true, but that the prisoner himself climbed through the fence and attacked them in the wheat field, because the body of Philip Hanson was found in the wheat field, on the very spot where the young green wheat was trampled down and soiled with blood, the head resting on the lap of George Erne, and but a single line of footprints appeared between that spot and the fence, and the feet that made them were clad in boots or shoes, while the prints of the feet of the other participants and witnesses were bare; and it was impossible for Philip Hanson, after receiving the deadly shot, to have run thirty-five or forty steps to the fence, climbed through it and have gone to the spot where his body was found.

On the whole case, it is but too evident that the prisoner, though young in years, was mature in malice and wickedness, and acted in this tragedy with cold and heartless deliberation.

ERRORS ASSIGNED.

First. Overruling motion for new trial.

This not a proper subject for exception. (*Railway Co.* v. *Heck*, 102 U. S., 120.)

Second. Charge of the court to the jury.

The exception taken to the charge of the court is too vague and indefinite. No ground is stated for the alleged

error assigned, but the court of review is required by this exception to examine the whole charge and pick out, if possible, such ground of error as it may discover. (*Hanna* v. *Maas*, 122 U. S., 26.)

The objection here, apparently, is to the definition of "justifiable homicide," given by the court in its charge. The judge inquires:

> When can a man slay another? When can he sit as a judge, passing upon the law, and a jury, passing upon the facts; and then as a jury applying the law to those facts and finding a verdict; and then again, acting as a court and entering up judgment; and then going out as a marshal or sheriff and executing that judgment, all at the same time; determining the law; determining the facts as judge, jury, and executioner, all at the same time. This is a mighty power in the hands of the citizen.

Apart from the turgid and somewhat sophomoric rhetoric in which this deliverance of the law is couched, we are unable to discover any error in the doctrine conveyed in these words. There can be no doubt of the fact that the man who, when confronted with apparent danger, takes the life of another and relies on the imminence of a peril which threatened him as an excuse for the deed, must be able to show that the circumstances which environed him did present to him a danger, threatening him, and persuading his mind and controlling his judgment as to its character and extent.

Dr. Wharton, in a philosophical discussion of the doctrine of Excuse and Justification, states the three theories that have been advanced as to the proper standpoint from

which the "apparent danger" of the accused, at the time of the homicide, is to be determined:

(1) The standpoint of the jury.

(2) The standpoint of the ideal "reasonable man."

(3) The standpoint of the accused.

Whichever theory may be adopted, the defendant at last incurs the responsibility of judging as to this apparent danger. (1 Wharton's Crim. Law, secs. 484–510.)

He quotes from Lamb's case the charge of the court:

> A man is not bound, if his life is in imminent peril or danger, to wait until he receives a fatal wound or has some great bodily injury inflicted on him. *If he think his life is in imminent peril* he has a right to act upon that thought and take life, but if he does it, it is at the risk of a jury saying *whether he was justified in forming that opinion or not.*

In *United States* v. *Outerbridge* (5 Sawyer, 620) Mr. Justice Field charged the jury and quoted the language of Mr. Justice Washington as follows:

> In the definition of justifiable homicide the following particulars are to be attended to: The intent must be to commit a felony. If it be only to commit a trespass, as to beat the party, it will not justify the killing of the aggressor. * * *
>
> In the next place, the intent to commit a felony must be apparent, which will be sufficient, although it should afterwards turn out that the real intention was less criminal or was even innocent. This apparent intention is to be collected from the attending circumstances, such as the manner of the assault, the nature of the weapons used, and the like. And, lastly, to produce this justification, it must appear

> that the danger was imminent and the species of resistance used necessary to avert it. (*United States* v. *Wiltberger*, 3 Wash., C. C., 521).

See *Commonwealth* v. *Selfridge*, reported at large in Horrigan and Thompson's cases of self defense, p. 2; *Commonwealth* v. *Woodward*, 102 Mass., 155.

The second error assigned is as to the charge of the court as to the defendant's testimony in his own behalf. It amounts, in fact, to nothing more than this—applicable as well to any other witness as to the defendant—that if the other evidence in the case tends to corroborate the testimony of the defendant, to that extent is it strengthened; but if it tends to contradict it, to that extent is it weakened. There is not a word in this part of the charge which directs the attention of the jury to the attitude of the defendant as a witness testifying in his own behalf. See Thompson on Trials, section 2418.

> He (the judge) may tell them (the jury) that they may consider the age, intelligence, interest in a case, or apparent prejudice, if any, and all other circumstances in evidence before them, in determining the credibility of witnesses.

The third error assigned is as to the charge of the judge as to the "accountability of this defendant," referring to his age.

Dr. Wharton says (Criminal Law, sec. 68):

> Between the ages of 7 and 14 responsibility is conditioned on capacity. If it appear that a child within these limits is *capax doli*, which is to be determined by the circumstances of the case, he may be

convicted and condemned.. It is a prima facie presumption of law that under 14 the child is not *capax dŏli.*

It would seem, then, that when the judge in this case stated to the jury that—

> When a child between the years of 7 and 11 commits a crime he is presumably not held accountable, yet this presumption may be overcome by proof. But from 11 years up the law contemplates that he is accountable for his criminal acts; that he is said to be conscious of right and wrong so as to be held responsible by the law, and to take away that condition it requires the production of proof showing the lack of accountability. In legal contemplation, from 11 years upward he is accountable.

It is evident that the court was in error in fixing 11 instead of 14 as the age of accountability, but it was not an error to the prejudice of the defendant and can avail him nothing here, because he had already testified before the jury, on February 13, 1893 (p. 139), that he would be 15 years old in March, 1893; consequently, he was 14 years old in March, 1892, and the murder with which he is charged is proven to have been committed on the 14th of May, 1892; so at the time of its commission the defendant was 14 years and 2 months old.

But the court in that charge goes far beyond the extract quoted in the assignment of errors. The court adds immediately below the paragraph quoted in the assignment of errors:

> Now you can not find the defendant guilty of any crime, unless you are satisfied from the whole of this testimony and from the law that I have given you,

> that the state of case which makes the crime is established beyond reasonable doubt. * * * The law defines the kind of doubt that we are to regard as a doubt for which a good reason can be given, a doubt that would so operate upon the mind of a reasonable man that he is not able to say that he has an abiding conviction, to a moral certainty, of the truth of the charge.

On the whole case we submit that the evidence fully justified and demanded the verdict that was rendered; and the charge given by the court to the jury was a correct statement of well-settled principles of law, and the judgment should be affirmed.

HOLMES CONRAD,
Assistant Attorney-General.